Supreme Court, U.S.
FILED
051589 JUN 13 2006
OFFICE OF THE CLERK

No. 05-

IN THE

Supreme Court of the United States

GARY DAVENPORT, MARTHA LOFGREN,
WALT PIERSON, SUSANNAH SIMPSON,
AND
TRACY WOLCOTT,

Petitioners,

v.

WASHINGTON EDUCATION ASSOCIATION,

Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of the State of Washington

PETITION FOR WRIT OF CERTIORARI

*MILTON L. CHAPPELL
c/o National Right to Work Legal Defense Foundation, Inc.
8001 Braddock Rd., Suite 600
Springfield, VA 22160
(703) 321-8510

STEVEN T. O'BAN
Ellis, Li, & McKinstry PLLC
Two Union Square
601 Union St., Suite 4900
Seattle, WA 98101-3906
(206) 682-0565

Counsel for Petitioners
**Counsel of Record*

June 2006

QUESTIONS PRESENTED

I. Do labor union officials have a First Amendment right to seize and use for politics the wages of employees who have chosen not to become union members?

II. Does a state campaign finance law that prohibits labor unions and their officials from seizing and using the wages of nonmembers for partisan political campaigns without obtaining the nonmembers' affirmative consent violate the First Amendment rights of labor unions?

PARTIES TO THE PROCEEDINGS BELOW

The parties to the proceeding in the court whose judgment is sought to be reviewed are listed below:

Gary Davenport, Martha Lofgren, Walt Pierson, Susannah Simpson, Tracy Wolcott, and the Washington Education Association.

Because no Petitioner is a corporation, no corporate disclosure statement is required under Supreme Court Rule 29.6.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

PARTIES TO THE PROCEEDINGS BELOW ii

TABLE OF AUTHORITIES vi

OPINIONS BELOW 1

JURISDICTION 1

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED 2

STATEMENT OF THE CASE 2

I. The Facts 3

II. The Proceedings Below 4

REASONS FOR GRANTING THE WRIT 8

I. The Washington Supreme Court's Decision That Labor Unions Have a Constitutional Right to Seize and Use the Wages of Nonmembers Conflicts with Decisions of This Court and Numerous Decisions of the United States Courts of Appeals and State Courts 10

TABLE OF CONTENTS-CONT.

Page

II. The Washington Supreme Court's Decision, That the State's Campaign Finance Law Prohibiting Labor Unions and Their Officials from Seizing and Using Nonmembers' Wages for Partisan Political Campaigns Without Obtaining Their Affirmative Consent Violates the First Amendment Rights of Labor Unions, Conflicts with Decisions of the United States Court of Appeals for the Sixth Circuit 20

III. The Washington Supreme Court's Decision Also Conflicts with Relevant Decisions of This Court 25

CONCLUSION 30

APPENDICES

A. Opinion of the Supreme Court of the State of Washington - March 16, 2006 ..... 1a

B. Unpublished Opinion of the Court of Appeals of Washington - June 24, 2003 ..... 42a

C. Order of the Superior Court of the State of Washington - January 18, 2002 ..... 45a

D. Opinion of the Court of Appeals of Washington - June 24, 2003 ..... 50a

TABLE OF CONTENTS-CONT.

Page

E. Order of the Superior Court for the State of Washington - May 10, 2001 ..... 77a

F. Constitutional and Statutory Provisions 81a

TABLE OF AUTHORITIES

Cases ***Page***

Abood v. Detroit Board of Education,
431 U.S. 209 (1977) 5, 7, 8, 21

American Federation of Labor v. American Sash & Door Co., 335 U.S. 538 (1949) 17

Arkansas State Highway Employees Local 1315 v. Kell, 628 F.2d 1099 (8th Cir. 1980) 15

Austin v. Michigan Chamber of Commerce,
494 U.S. 652 (1990) 25, 26, 27, 30

Babbitt v. United Farm Workers National Union,
442 U.S. 289 (1979) 15

Brown v. Alexander,
718 F.2d 1417 (6th Cir. 1983) 11, 13

California Medical Association v. FEC,
453 U.S. 182 (1981) 23

Chicago Teachers Union v. Hudson,
475 U.S. 292 (1986) 3, 8, 19, 24

City of Charlotte v. Local 660, International Association of Firefighters, 426 U.S. 283 (1976) 11

FEC v. Beaumont,
539 U.S. 146 (2003) 26, 27

TABLE OF AUTHORITIES-CONT.

Page

FEC v. National Education Association,
457 F. Supp. 1102 (D.D.C. 1978) 16, 28

FEC v. National Right to Work Committee,
459 U.S. 197 (1982) 25, 27, 29, 30

Finney v. Hawkins,
189 Va. 878, 54 S.E.2d 872 (1949) 18, 19

First National Bank of Boston v. Bellotti,
435 U.S. 765 (1978) 25

Fraternal Order of Police v. Mayor & City Council,
916 F.2d 919 (4th Cir. 1990) 14

Jacobus v. Alaska,
338 F.3d 1095 (9th Cir. 2003) 23

Lincoln Federal Labor Union No. 19129 v. Northwestern Iron & Metal Co.,
335 U.S. 525 (1949) 17, 19

Lincoln Federal Labor Union No. 19129 v. Northwestern Iron & Metal Co.,
149 Neb. 507, 31 N.W.2d 477 (1948),
aff'd, 335 U.S. 525 (1949) 18

Machinists v. FEC,
678 F.2d 1092 (1982) 21, 23, 26

TABLE OF AUTHORITIES-CONT.

Page

Machinists v. Street,
367 U.S. 740 (1961) 6, 7

Madsen v. Women's Health Center,
512 U.S. 753 (1994) 22

Mariani v. United States,
212 F.3d 761 (3d Cir. 2000) 30

Mascari v. Teamsters,
187 Tenn. 345, 215 S.W.2d 779 (1948) 18

McConnell v. FEC,
540 U.S. 93 (2003) 14, 25, 26, 30

Michigan State AFL-CIO v. Employment Relations Commission, 453 Mich. 362, 551 N.W.2d 165 (1996) 15

Michigan State AFL-CIO v. Miller,
215 F.3d 1327 (6th Cir. 2000), 2000 WL 712539 .. 23

Michigan State AFL-CIO v. Miller,
103 F.3d 1240 (6th Cir. 1997) 20, 21, 23

Michigan State AFL-CIO v. Miller,
891 F. Supp. 1210 (E.D. Mich. 1995),
rev'd, 103 F.3d 1240 (6th Cir. 1997) 21

TABLE OF AUTHORITIES-CONT.

Page

Philadelphia Fraternal Order of Correctional Officers v. Rendell,
1997 WL 1161146 (3d Cir. 1997) 16, 17

Pipefitters v. United States,
407 U.S. 385 (1972) 26, 27

Railway Clerks v. Allen,
373 U.S. 113 (1963) 6

Railway Employes' Department v. Hanson,
351 U.S. 225 (1956) 17

Regan v. Taxation with Representation of Washington,
461 U.S. 540 (1983) 25

Smith v. Arkansas State Highway Employees,
441 U.S. 463 (1979) 13, 14, 25

South Carolina Education Association v. Campbell,
883 F.2d 1251 (4th Cir. 1989) 13

State v. Alaska Civil Liberties Union,
978 P.2d 597 (Alaska 1999),
cert. denied, 528 U.S. 1153 (2000) 23

Toledo Area AFL-CIO Council v. Pizza,
154 F.3d 307 (6th Cir. 1998) 15, 21, 24, 25

TABLE OF AUTHORITIES-CONT.

Page

Turner Broadcasting System, Inc. v. FCC,
512 U.S. 622 (1994) 22

United States v. Boyle,
482 F.2d 755 (D.C. Cir. 1973) 28, 30

United States v. CIO,
335 U.S. 106 (1948) 27

United States v. O'Brien,
391 U.S. 367 (1968) 22

Washington Education Association v. Smith,
96 Wash. 2d 601, 638 P.2d 77 (1981) 26

Constitutions, Statutes, and Rules

United States Constitution,
amend. I ..... *passim*
amend. XIV 2

Federal Election Campaign Act of 1971, 2 U.S.C.
§ 431 *et seq.* 26
§ 441b(a) 25, 27, 28
§ 441b(b)(3) 28
§ 441b(b)(3)(A) 27, 28
§ 441b(b)(4)(A)(ii) 25, 28

TABLE OF AUTHORITIES-CONT.

Page

28 U.S.C.
§ 1257(a) 1
§ 2403(b) 2

National Labor Relations Act, 29 U.S.C.
§ 159(e). 10
§ 164(b) 10

Alaska Stat.
§ 15.13.074(f) (LexisNexis 2004) 28
§ 15.13.135 (LexisNexis 2004) 28

Ariz. Rev. Stat. Ann.
§ 16-919(B) (West Supp. 2005) 28
§ 16-920 (West Supp. 2005) 28
§ 16-921 (West Supp. 2005) 28

Cal. Gov't Code
§ 3515.7(d) (West Supp. 2006) 10
§ 3546(d)(1) (West Supp. 2006) 10

Cal. Pub. Util. Code
§ 99566.1(d)(1) (West Supp. 2006) 10

5 Ill. Comp. Stat. Ann. 315/3(g) (West 2005) 9

115 Ill. Comp. Stat. Ann. 5/11 (West 1998) 9

Iowa Code Ann. § 20.26 (West 2001) 28

TABLE OF AUTHORITIES-CONT.

Page

Md. Code Ann., Elec. Law
§ 13-242 (LexisNexis Supp. 20052002) 28
§ 13-243 (LexisNexis 2002) 28

Md. Code Ann., Educ.
§ 6-504(b) (LexisNexis Supp. 2005) 9
§ 6-504(d)(1)(LexisNexis Supp. 2005) 9
§ 6-504(d)(3)(iv)(1) (LexisNexis Supp. 2005) 9
§ 6-504(d)(3)(iv)(2) (LexisNexis Supp. 2004) 9

Mich. Comp. Laws Ann.
§ 169.254 (West 2005) 28
§ 169.255 (West 2005) 28

Minn. Stat. Ann. § 179A.06(3) (West Supp. 2006) 10

Mont. Code Ann.
§ 39-31-402(3) (2005) 9
§ 39-32-109(2)(d) (2005) 9

Neb. Rev. Stat. Ann.
§ 49-1469 (LexisNexis Supp. 2005) 28
§ 49-1469.06 (LexisNexis Supp. 2005) 28

N.J. Stat. Ann. § 34:13A-5.5(b) (West Supp. 2005) 10

N.M. Stat. Ann. § 10-7E-4(J) (Michie Supp. 2003) 10

TABLE OF AUTHORITIES-CONT.

Page

N.C. Gen. Stat. Ann.
§ 163-278.19(a) (LexisNexis 2005) 28
§ 163-278.19(b) (LexisNexis 2005) 28

N.D. Cent. Code
§ 16.1-08.1-03.3 (LexisNexis Supp. 2005) 28

Ohio Rev. Code Ann.
§ 3517.082 (West Supp. 2006) 28
§ 3599.03 (West Supp. 2006) 28
§ 3599.031(A) (West Supp. 2006) 28

Okla. Const. Art. 23, § 1A 10

Pa. Cons. Stat. Ann.
§ 1101.1701 (West 1991) 28
§ 1102.2 (West Supp. 2005) 10
§ 1102.4 (West Supp. 2005) 10

S.D. Codified Laws Ann.
§ 12-25-1(1) (LexisNexis Supp. 2003) 28
§ 12-25-2 (LexisNexis Supp. 2003) 28

Utah Code Ann.
§ 20A-11-1403 (LexisNexis Supp. 2005) 28
§ 20A-11-1404 (LexisNexis Supp. 2005) 28

Vt. Stat. Ann. tit. 3,
§ 902(19) (LexisNexis 2003) 10
§ 1011(4) (LexisNexis 2003) 10

TABLE OF AUTHORITIES-CONT.

Page

Wash. Rev. Code,
RCW 41.04 26

Washington Public Employees Collective Bargaining Act,
RCW 41.56.122(1) 3

Washington Educational Employment Relations Act,
RCW 41.59.100 3

Washington Fair Campaign Practices Act, § 760,
RCW 42.17.760 ..... *passim*

Wis. Stat. Ann.
§ 11.29 (West 2004) 28
§ 111.02(10m) (West 2002) 10
§ 111.70(1)(n) (West Supp. 2002) 10
§ 111.81(16) (West Supp. 2005) 10
§ 111.70(2) (West 2002) 10
§ 111.85(2)(a) (West 2002) 10

Wyo. Stat. Ann.
§ 22-25-102 (LexisNexis 2005) 28
§ 22-25-102(h) (LexisNexis 2005) 28

Federal Election Commission Regulations, 11 C.F.R.
§ 114.5(a) 28
§ 114.5(a)(1) 28
§ 114.5(g)(2) 28

TABLE OF AUTHORITIES-CONT.

Page

Supreme Court Rule,
13.1 1
29.4(b) 2
29.6 ii

Other Authorities

Lillian R. Bevier, *Specious Arguments, Intractable Dilemmas*,
94 Colum. L. Rev. 1258 (1994) 24

Petitioners Gary Davenport, Martha Lofgren, Walt Pierson, Susannah Simpson, and Tracy Wolcott respectfully pray that a writ of certiorari issue to review the judgment and opinion of the Supreme Court of the State of Washington entered on March 16, 2006.

OPINIONS BELOW

The opinion of the Washington Supreme Court, Appendix ("App.") A, *infra* 1a, is reported at 130 P.3d 352 (Wash. 2006). That opinion decided two consolidated cases: the instant case, *Davenport v. Washington Education Association,* docket number 74316-9 in the court below; and *State ex rel. Public Disclosure Commission v. Washington Education Association* ("*PDC*"), docket number 74268-5. The unpublished opinion of the Washington Court of Appeals in *Davenport*, App. B, *infra* 42a, is reported at 117 Wash. App. 1035 (2003). The decision of the trial court in *Davenport*, App. C, *infra* 45a, is not reported. The decision of the Washington Court of Appeals in the consolidated case, *PDC*, App. D, *infra* 50a, is reported at 117 Wash. App. 625, 71 P.3d 244 (2003). The decision of the trial court in *PDC*, App. E, *infra* 77a, is not reported.

JURISDICTION

The Washington Supreme Court entered judgment on March 16, 2006. The petition is timely under Supreme Court Rule 13.1. This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1257(a). Although in *Davenport* neither the State of Washington nor any agency, officer, or employee thereof is a party, the Public Disclosure Commission, which is an agency

of the State, is a party to the consolidated case below, *PDC*. Accordingly, 28 U.S.C. § 2403(b) may apply and this initial document shall be served on the Attorney General of the State of Washington. The notifications required by Rule 29.4(b) have been made.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the First and Fourteenth Amendments to the United States Constitution and the Washington Fair Campaign Practices Act, § 760; RCW 42.17.760. *See* App. F, *infra* 81a.

STATEMENT OF THE CASE

This case presents the question whether a state campaign finance statute that requires labor union officials to get a **nonmember's** affirmative consent before using the nonmember's wages for partisan political campaigns violates the First Amendment rights of labor unions and their members.

Respondent Washington Education Association ("WEA"), a labor union, was the defendant in both consolidated cases below. In *PDC*, WEA challenged the constitutionality of § 760 of the Washington Fair Campaign Practices Act in its motion for summary judgment at the trial court. The trial court found § 760 constitutional. App. E at 78a. The WEA appealed that ruling to the court of appeals, which held § 760 unconstitutional because its "affirmative authorization requirement unduly burdens unions." App. D at 69a.

In *Davenport*, the court of appeals reversed and remanded Petitioners' suit for dismissal "[b]ecause we hold today in [*PDC*] that RCW 42.17.760 is unconstitutional[. Thus]

plaintiffs, as non-objecting, nonunion employees, lose standing to sue for their un-refunded agency fees." App. B at 43a. Davenport and the State separately petitioned for review in the Washington Supreme Court, defending the constitutionality of § 760. App. A at 2a, 7a.

I. The Facts

Petitioners are five current or former public educators who are not members of the monopoly bargaining representative, WEA. Nonmembers are required by statute, RCW 41.59.100 and RCW 41.56.122(1), to pay fees to the union that equal member dues. A portion of members' dues and nonmembers' fees goes to support political and ideological causes that are unrelated to the union's collective bargaining activities. App. A at 2a-3a, 6a.

However, Washington's campaign finance law, RCW 42.17.760, prohibits unions from using the compulsory fees seized from the wages of any nonmember on political campaigns, unless the nonmember has affirmatively authorized such use. App. F at 81a. The WEA stipulated with the PDC that it had violated § 760 by failing to get the affirmative authorization of all nonmembers before using their fees for political purposes. App. A at 5a.

The WEA developed its "*Hudson*" process[1] to address the fact that the dues-equivalent fees charged nonmembers exceed what the WEA needs for collective bargaining. App. A at 3a-4a. These excess fees are referred to in the case law and in the WEA's "*Hudson*" process as "nonchargeable expenses."

---

[1] This process stems from the guidelines stated in *Chicago Teachers Union v. Hudson*, 475 U.S. 292 (1986).

App. A at 3a. Nonchargeable expenses include and exceed the political contributions covered by § 760. *Id.*

Only if a nonmember timely objects to the fees charged does the WEA refund to that person the percentage of the fees that it considers nonchargeable. *Id.* at 3a-4a. Nonmembers who fail to file a timely objection receive no rebate and must subsidize the nonchargeable expenses, including the political campaigns covered by § 760. App. A at 4a. At issue are the fees nonobjecting nonmembers paid that WEA used for partisan political campaigns without the nonmembers' affirmative authorization.[2]

II. The Proceedings Below

In March 2001, Petitioners brought this class action law suit to recover agency shop fees that the WEA collected and used for partisan political purposes without the nonmembers' affirmative authorization, in violation of RCW 42.17.760. App. A at 6a.

In their complaint, Petitioners alleged an implied private right of action under § 760, and three tort claims: conversion, fraudulent concealment, and breach of fiduciary duty. App. A at 6a. Petitioners sought a refund of that portion of nonmembers' fees used for political expenditures in violation of § 760. The WEA moved to dismiss. The trial court denied the motion, except as to the breach of fiduciary duty claim. The trial court also determined the applicable statute of limitations and certified Petitioners' class. Finally, the trial court stayed further proceedings pending an interlocutory appeal. App. A at 6a; App. C at 47a-49a.

---

[2]The Washington Supreme Court construed § 760 "as requiring more than a nonresponse to a *Hudson* packet." App. A at 11a.

The WEA sought discretionary review of the trial court's denial of its motion to dismiss. Division II of the court of appeals accepted review. At the WEA's request, the court of appeals set oral argument both for this case and *PDC* before the same panel.[3] In light of holding § 760 unconstitutional in *PDC* on June 24, 2003, that same day a majority of the court of appeals panel in *Davenport* reversed the trial court and remanded for dismissal of Petitioners' claims. App. A at 6a-7a.

The 2-1 appellate majority recognized that the "only authority that a union has to compel nonmembers to pay agency fees is statutory." App. D at 57a. Yet they found the campaign finance law unconstitutional because § 760's affirmative authorization requirement, or "opt-in procedure, upset[s] the balance between nonmembers' rights and the rights of the union and the majority," "ignores a union's right to use non-objectors' agency fees on political expenditures," and "unduly burdens unions." App. D at 68a, 69a.

Then Chief Judge Hunt dissented. She noted that this Court's propositions that an "opt in" provision is not constitutionally required[4] do not support the converse, *i.e.*, that an "opt

---

[3]Prior to the commencement of *Davenport*, the Public Disclosure Commission, through the Attorney General, brought a civil enforcement action against the WEA in superior court for violations of § 760. During the PDC's pre-filing investigation, the WEA admitted in a written stipulation to violations of RCW 42.17.760. After a two-week bench trial, the trial court found that the WEA violated § 760, awarded the State $200,000, and then doubled that amount based on its finding that the WEA intentionally violated the law. A 2-1 majority of the court of appeals panel reversed the trial court based on the conclusion that § 760 is unconstitutional. App. A at 4a-6a; App. D at 53a-57a, 69a.

[4]*See Abood v. Detroit Bd. of Educ.*, 431 U.S. 209, 235-36, 237-38, 244

(continued...)

in" provision such as Washington's is constitutionally barred. App. D at 71a. She also noted that none of this Court's agency fee decisions held "that the Constitution *mandates* that [the] burden [of objecting] rest[s] on the employee." *Id.* at 73a.

Both the State and the *Davenport* plaintiffs timely petitioned for review in the Washington Supreme Court. The court granted both petitions for review, consolidated the two cases, and in a 6-3 decision affirmed the court of appeals' holding that § 760 is unconstitutional. App. A at 7a, 29a. The majority found that the campaign finance statute imposes an unconstitutional restriction on the political speech of the union, its members, and its nonmembers.

> [T]he statute is unconstitutional because its requirement of affirmative authorization amounts to an impermissible presumption that each nonmember objects to the union's use of his or her fees for political activities. * * * [B]y presuming the dissent of nonmembers, § 760 upsets the **balance** of members' and nonmembers' constitutional rights in the context of a union's expenditures for political activities.

App. A. at 16a (emphasis added).

Chief Justice Sanders, joined by two other justices, strongly dissented:

> The majority turns the First Amendment on its head. Unions have a statutory, not constitutional, right to

---

[4](...continued)
(1977); *Railway Clerks v. Allen*, 373 U.S. 113, 121-22 (1963); *Machinists v. Street*, 367 U.S. 740, 770, 772-74 (1961).

cause employers not only to withhold and remit membership dues but also to withhold and remit fees from nonmembers in an equivalent amount. Absent this statutory mechanism for the withholding and remission of agency fees (or membership fees for that matter), there is no right, constitutional or otherwise, for the union to require it. *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209, 223 * * *.

* * *

From the majority's misconstruction of the "dissent is not to be presumed"[5] language a false "balance" requirement is invented. Other than general paeans to the right of association, the majority cites no other precedent for its holding that the "balance" between the associational rights of dissenters and non-dissenters is upset by requiring one to register assent, rather than register dissent. Again, if the elimination of a payroll deduction does not abridge the constitutional rights of union members and nonobjecting nonmembers to associate, it is inconceivable that requiring assent as a precondition to using funds generated by a payroll deduction abridges such rights.

* * *

But there is *no* association between the union and agency fee payers because by definition these individuals have refused to join (associate with) the union. The absence of membership defeats any claim that the regulation of statutorily required monetary support can possibly violate the right of union members to freely associate with one another for political advocacy. Rather it puts in jeopardy the

---

[5] *Abood*, 431 U.S. at 238; *Street*, 367 U.S. at 774.

> First Amendment right of nonmembers to refuse to associate with a union which uses their money to advance a political agenda with which they might disagree. *That* is the concern of the First Amendment in this context, as it is the even more protective concern of RCW 42.17.760.

App. A at 30a, 36a-37a (footnote omitted), 40a-41a (emphasis in original).

REASONS FOR GRANTING THE WRIT

Without any support on point from this Court, a majority of the Washington Supreme Court concocted, from the statutory privileges granted labor unions to seize and use nonmembers' wages, a "constitutional right," under color of the First Amendment, for unions to spend those fees for partisan politics unless the nonmember affirmatively "opts out" by invoking a union's *Hudson* procedures. Thus, this Court's *Hudson* protections have been transmogrified from a First Amendment shield for nonunion employees into a First Amendment sword for unions.

The majority below erroneously turned the shield this Court provides nonmembers from the full reach of statutes compelling them to financially support all of the unions' varied activities[6] into a dagger piercing the State's statutory protection of nonmembers from involuntarily supporting the unions' partisan political campaigns. This turning of the First Amendment on its head was based on nonexistent "constitutional rights" of union officials and members. *See infra* pp. 10-20.

---

[6] *Hudson*, 475 U.S. at 301-11; *Abood*, 431 U.S. at 234-36.

Never before has a court suggested that a campaign finance statute requiring unions to secure the affirmative consent of **nonmembers** before using their compelled moneys on partisan politics violates a union's freedom of association, because freedom of association has never before been interpreted as broadly as the courts did below. The majority's decision striking down the "opt in" requirement that limited the union's unfettered use of the compelled wages of nonmembers for politics as violative of the First Amendment did not misapply a properly stated rule of law, it turned the First Amendment rule of law on its head.

Moreover, the majority's holding assumes that unions have a "constitutional right" to an "agency fee" equivalent to full union dues from all represented employees, members and nonmembers alike, as long as unions allow dissenting nonmember employees to "opt out" of the unions' political spending. Accordingly, unless reversed by this Court, the decision below jeopardizes numerous federal and state statutes that limit or prohibit a union's unfettered collection and use of nonmembers' coerced fees, including statutes governing campaign finance,[7] compulsory unionism,[8] and the Right to

---

[7] *See infra* pp. 25-26, 28 & note 22.

[8] Like Washington's campaign finance law, some states' compulsory unionism statutes require voluntary political contributions to be separate from the compelled fee. 5 Ill. Comp. Stat. Ann. 315/3(g) (West 2005); 115 Ill. Comp. Stat. Ann. 5/11 (West 1998). Others prohibit the use of nonmember fees on political activities or contributions. Md. Code Ann., Educ. § 6-504(d)(3)(iv)(2) (LexisNexis Supp. 2004); Mont. Code Ann. §§ 39-31-402(3), 39-32-109(2)(d) (2005). Unlike Washington, not all state compulsory unionism statutes allow the union to compel nonmembers to pay an amount equal to dues. Some limit the amount to the costs of representing the members of the bargaining unit, Md. Code Ann., Educ. §§6-504(b), (d)(1) & (d)(3)(iv)(1) (LexisNexis Supp. 2005). Others limit

(continued...)

Work[9]. These jeopardized statutes have all been previously upheld by this Court or various state and federal courts against similar First Amendment attack.[10]

I. The Washington Supreme Court's Decision That Labor Unions Have a Constitutional Right to Seize and Use the Wages of Nonmembers Conflicts with Decisions of This Court and Numerous Decisions of the United States Courts of Appeals and State Courts.

The decision below is in direct conflict with this Court's holdings that unions and individuals who associate with them have no First Amendment associational right to monopoly (collective) bargaining or payroll deduction of full union dues (and, by logical extension, nonmember agency fees).

---

[8](...continued)
the fee to no more than 85% of dues. Minn. Stat. Ann. § 179A.06(3) (West Supp. 2006); N.J. Stat. Ann. § 34:13A-5.5(b) (West Supp. 2005); Vt. Stat. Ann. tit. 3, §§ 902(19), 1011(4) (LexisNexis 2003). Still others limit the fee to the constitutionally chargeable amount. N.M. Stat. Ann. § 10-7E-4(J) (Michie Supp. 2003); Pa. Cons. Stat. Ann. §§ 1102.2 & 1102.4 (West Supp. 2005). Some even allow the bargaining unit members to rescind or deauthorize the compulsory unionism requirement, Cal. Gov't Code §§ 3515.7(d), 3546(d)(1) (West Supp. 2006); Cal. Pub. Util. Code § 99566.1(d)(1) (West Supp. 2006); Wis. Stat. Ann. §§ 111.02(10m), 111.70(1)(n) & (2), 111.85(2)(a) (West Supp. 2002), 111.81(16) (West Supp. 2005); *see also* 29 U.S.C. § 159(e).

[9]*See* Sections 9(e) and 14(b) of the National Labor Relations Act, 29 U.S.C. §§ 159(e) and 164(b) (providing for deauthorization of compulsory unionism requirements and state prohibitions of such requirements by Right-to-Work provisions); Okla. Const. Art. 23, § 1A; and the twenty-one other constitutional and statutory Right-to-Work provisions listed in App. A at 31a n.3.

[10]*See infra* pp. 10-20.

In *City of Charlotte v. Local 660, International Association of Firefighters,* 426 U.S. 283 (1976), this Court held that the First Amendment imposes no obligation on the government to deduct union dues (or fees) from public employees' wages. As Chief Justice Sanders notes in his dissent: "Should the legislature of the State of Washington choose to repeal the mandatory withholding provisions [dues checkoff], there would be no constitutional impediment to doing so. **And no party to this proceeding claims there is.**" App. A at 31a (emphasis added).

Nevertheless, the majority struck down § 760 of the State's campaign finance law, which merely requires labor unions to secure the affirmative authorization of nonmembers before using the nonmembers' mandatory fees for political campaigns, as a violation of the unions and their members' First Amendment right of association. The majority mistakenly believed that this Court's holdings, involving the **constitutional rights of nonunion employees** who dissent to the use of their fees for politics, that nonmembers are adequately protected by an opportunity to "opt out" of paying for those activities means that the **First Amendment rights of unions and their members** are violated if the State further protects nonmembers by a statute that requires an "opt in" provision before their fees can be used for politics.

If a law prohibiting dues checkoff for a union does not violate the right of association,[11] a law that merely places a procedural requirement before unions can use nonmembers' mandatory checkoff for politics surely cannot violate the unions' First Amendment rights. The existence of a constitutional floor protecting First Amendment rights of nonmembers

---

[11] *See Brown v. Alexander,* 718 F.2d 1417, 1421-22 (6th Cir. 1983).

does not provide unions with constitutional rights that this Court has found do not exist for unions and their members. As Justice Sanders explained in his dissent:

> Given that the legislature could constitutionally repeal the whole statutory scheme allowing withholding in the first place, I find it nearly beyond comprehension to claim that the legislature, or the people acting through their sovereign right of initiative, could not qualify these statutes to ensure their constitutional application.
>
> In short, the majority turns the First Amendment on its head to invalidate a state statute enacted to further protect the constitutional rights of nonunion members who are required to pay agency fees as the price of their employment.
>
> * * *
>
> [I]t would be perfectly constitutional if the State chose to eliminate the payroll deduction for collection of agency shop fees altogether. How then could merely placing a procedural condition on the collection of a small portion of such shop fees (those that would be used to influence an election or to operate a political committee) violate the constitution?
>
> **The majority chooses not to address this line of cases.** Instead it distorts cases delineating the requirements protecting dissenting union members and nonmembers from having their dues used to support political activities with which they disagree to do the opposite: limit the State's ability to protect such dissenters.

App. A at 32a, 33a-34a (emphasis added).

The majority also found that § 760 violates the First Amendment rights of unions and their members, because it believed that the statute's "opt in" requirement limited the unions' efficiency in raising and using nonmembers' fees for politics. App. A at 16a-18a, 27a-29a. In holding that unions are not entitled to payroll deductions, the Fourth and Sixth Circuits, in conflict with the majority below, found that such impairment does not violate the First Amendment.

The Fourth Circuit admitted that the loss of payroll deductions could impair the effectiveness of a union in representing its members and result in less money for engaging in First Amendment protected lobbying activities, legal advocacy, and other programs. *South Carolina Educ. Ass'n v. Campbell*, 883 F.2d 1251, 1256 (4th Cir. 1989). Nevertheless, "such 'impairment' * * * is not one that the First Amendment proscribes," because the constitution does not entitle unions to the funds necessary to realize all the advantages of First Amendment freedoms. *Id.* at 1257 (citing *Smith v. Arkansas State Highway Employees*, 441 U.S. 463, 465 (1979)). The state's decision not to subsidize the free association and free speech rights of the union and its members did not infringe these rights. *Campbell*, 883 F.2d at 1257.

The Sixth Circuit in *Brown v. Alexander*, 718 F.2d 1417, 1421, 1423, 1429 (6th Cir. 1983), held that even if denial of payroll deductions, which the statute conferred on one union but not another, burdened the deprived union, "such a burden in the form of 'impairing the effectiveness' of plaintiff local unions was constitutionally permissible * * *." *Id.* at 1421 (citation omitted).

Just as dues checkoff is not a fundamental right, collective bargaining is not guaranteed by the First Amendment. *Smith*, 441 U.S. at 464-65 & n.2. Although the First Amendment

rights of association and advocacy protect the right of unions to exist and the right of employees to join together in unions and to advocate, those rights cannot be stretched to impose an obligation on the government to recognize a union, bargain with it, or allow the union to process grievances. *Id.* Requiring unions to get the affirmative authorization of nonmembers to use their compelled fees for politics does not impede the right to join together in a group of like-minded individuals and exercise free speech rights.

This Court found that First Amendment rights were not involved or violated in a state's refusal to deal with a union over member grievances. *Id.* at 464. Likewise, § 760's requirement that unions secure the affirmative authorization of nonmembers before using their compelled fees for partisan political campaigns neither prevents union membership nor voluntary participation with the union. A law does not violate an organization's right of freedom of association just because the law makes more difficult, rather than prohibits, the organization's political fund raising. *See McConnell v. FEC*, 540 U.S. 93, 203-04 (2003).

The majority below is in conflict with two courts of appeals on this point. The Fourth Circuit upheld against First Amendment attack a city charter provision providing that no employee organization would be recognized as a bargaining representative for city employees. *Fraternal Order of Police v. Mayor & City Council*, 916 F.2d 919, 923 (4th Cir. 1990). The court of appeals concluded that the provision did not violate either the union or its members' First Amendment rights, as "the city officials were free to refuse to speak with whomever they chose – be it private individuals or representative associations." *Id.* Thus, there is no constitutional right to

bargain collectively[12] and statutes prohibiting monopoly bargaining do not violate the First Amendment.

The Eighth Circuit held that "the First Amendment does not impose any duty on a public employer **to affirmatively assist**, or even to recognize a union." *Arkansas State Highway Employees Local 1315 v. Kell*, 628 F.2d 1099, 1102 (8th Cir. 1980) (emphasis added).

While the power to persuade is protected by the First Amendment, the power to compel conformity (and financial support) is not. *Michigan State AFL-CIO v. Employment Relations Comm'n*, 453 Mich. 362, 370, 551 N.W.2d 165, 169 (1996). Section 760 does not impair the ability of individuals to participate in the partisan political contributions of unions, because it allows unions to persuade nonmembers to support the unions' partisan political spending and secure their affirmative authorization. It only reduces a union's power to compel financial political support from nonmembers through the "opt out" system that inherently fails to indicate voluntary support.[13]

---

[12]Collective bargaining is a statutory right. *See Babbitt v. United Farm Workers Nat'l Union*, 442 U.S. 289, 313-14 (1979). Collective bargaining as a statutory right requires both parties to confer in good faith – to listen to each other. The First Amendment does not. Moreover, public employees are not a protected class. *Toledo Area AFL-CIO Council v. Pizza*, 154 F.3d 307, 322 (6th Cir. 1998); *Michigan State AFL-CIO v. Employment Relations Comm'n*, 453 Mich. 362, 380, 381, 551 N.W.2d 165, 173 (1996).

[13] [A] look at some statistics in this case supports the conclusion that reverse check-off ["opt out"] results in some unknowing, and therefore, involuntary, [political] contributions. * * * Implicit in an exchange between counsel for [the union] and the Court that occurred during oral argument herein is an acknowledgment that something other than a willingness by the member to be associated with the

(continued...)

If an ordinance banning monopoly bargaining does not violate the associational right of unions and their members, how can a campaign finance law that merely requires unions to get the affirmative consent of nonmembers before using their compelled fees for political campaigns violate the First Amendment?

In an analogous case, the Third Circuit upheld against First Amendment attack by city employees a city ordinance denying them any mechanism to choose a different bargaining representative from the one designated in that ordinance thirty-six years earlier. *Philadelphia Fraternal Order of Corr. Officers v. Rendell*, 1997 WL 1161146 (3d Cir. 1997). Because "there is no constitutional right to bargain collectively," the court of appeals found "that the First Amendment's freedom of association provides [no] * * * right to choose a bargaining representative." *Id.* at *1, *3.

The Third Circuit also repudiated the theory underlying the court below's reliance on the "difficulties" § 760 might place on a union's ability to effectively obtain use of nonmembers' fees for political campaigns. "What appellants demand

---

[13](...continued)

union's political activities operates to make reverse check-off so advantageous to the union's funding mechanism. * * * [There] appears to be a curtain of indifference that envelopes the NEA's members when finances are involved. With respect to their dues, [the union] raise[s] this curtain through payroll deduction. While it is still up, they add to the deduction the additional dollar for their political action fund. Then through reverse check-off, they lower the curtain back around its members to cause that indifference to insulate the union from requested refunds. * * * In this Court's view, "knowing free-choice" means an act intentionally taken and not the result of inaction when confronted with an obstacle.

FEC v. National Educ. Ass'n, 457 F. Supp. 1102, 1107, 1108, 1109 (D.D.C. 1978).

is a Constitutional right to effective advocacy of their viewpoints. That right simply does not exist. 'The First Amendment * * * provides no guarantee that a speech will persuade or that advocacy will be effective.' * * * Moreover, not all means of expression have been foreclosed." *Id.* at *3 (citations omitted).

If the First Amendment does not guarantee effective advocacy, how can a campaign finance law that merely requires unions to get the affirmative consent of nonmembers before using their compelled fees for political campaigns violate the First Amendment? Although the Washington Supreme Court found such a violation, it never answered these questions, because it never discussed any of these cases or the settled rule of law they reflect.

The majority's decision also conflicts with this Court's decisions upholding state Right-to-Work laws that "were challenged as violations of the right of freedom of speech, of assembly, and of petition guaranteed unions and their members by the First Amendment." *Lincoln Fed. Labor Union No. 19129 v. Northwestern Iron & Metal Co.*, 335 U.S. 525, 528-31 (1949); *accord American Fed'n of Labor v. American Sash & Door Co.*, 335 U.S. 538, 540 (1949); *see also Railway Employes' Dep't v. Hanson*, 351 U.S. 225, 233 (1956). Like the campaign finance law struck down by a majority below, "[n]othing in the language of the [Right-to-Work] laws indicates a purpose to prohibit speech, assembly, or petition." *Lincoln Fed.*, 335 U.S. at 530. As previously noted, § 760 allows a union to persuade nonmembers to support its partisan political spending and ensures that such support is voluntarily given by requiring affirmative authorization.

This Court specifically rejected the argument adopted by the majority below that the right to association entails an effective union movement and sufficient membership:[14]

> There cannot be wrung from a constitutional right of workers to assemble to discuss improvement of their own working standards, a further constitutional right to drive from remunerative employment all other persons who will not or can not, participate in union assemblies * * * [or] a constitutional guarantee that none shall get and hold jobs except those who will join in * * * the assembly's plans. For where conduct affects the interests of other individuals and the general public, the legality of that conduct must be measured by whether the conduct [c]onforms to valid law, even though the conduct is engaged in pursuant to plans of an assembly.[15]

Lincoln Fed., 335 U.S. at 531.

A union's making partisan political contributions clearly "affects the interests of other individuals and the general public." *Id.* Moreover, the union's constitutional right of

---

[14]The unions argued in *Lincoln Federal* that the right to a closed shop is:

> "indispensable to the right of self organization and the association of workers into unions" * * * [and] to achievement of sufficient union membership to put unions and employers on a full equality for collective bargaining[. Thus,] a closed shop is consequently "an indispensable concomitant" of "the right of employees to assemble into and associate together through labor organizations."

335 U.S. at 530 (citation omitted).

[15]*Accord Finney v. Hawkins*, 189 Va. 878, 881-84, 54 S.E.2d 872, 874-75 (1949); *Lincoln Fed. Labor Union No. 19129 v. Northwestern Iron & Metal Co.*, 149 Neb. 507, 519-21, 538, 31 N.W.2d 477, 485-86, 494 (1948); *Mascari v. Teamsters*, 187 Tenn. 345, 215 S.W.2d 779 (1948).

association does not provide a further constitutional right to use for politics the mandatory fees of nonmembers who have not undertaken the burden of "opting out" of partisan political contributions in response to the union's *Hudson* notice.

More than fifty years ago the Supreme Court of Virginia cogently observed:

> Legislation that protects the citizen in his freedom to disagree and to decline an association which a majority would thrust upon him on the ground that it knows what is best for him, does no violence to the spirit of our fundamental law. The protection of minorities is the boast of our institutions and a basis of their asserted superiority over totalitarian regimes. The results have demonstrated the value of the democratic process.

Finney v. Hawkins, 189 Va. 878, 888, 54 S.E.2d 872, 877 (1949). Sadly, in the early years of the 21st century, a majority of the Washington Supreme Court has failed to maintain our fundamental law.

Because unions have no constitutional right to compel nonmembers to pay fees, the State imposes no unconstitutional burden on unions when it regulates the relationship between unions and nonmembers or the amount of, or procedures for, agency fees. In other words, because "[t]he only authority that a union has to compel nonmembers to pay agency fees is statutory," App. D at 57a, the state can prohibit entirely or restrict that authority without interfering with a union's constitutional rights. *See Lincoln Fed.*, 335 U.S. at 529-31.

This Court has conclusively held that the First Amendment rights of labor unions and their members are not violated

by statutes that deny them 1) collective bargaining, 2) payroll deduction of union dues and fees, and 3) the ability to require all employees to either become a union member or pay union fees. Therefore, it is inconceivable how a campaign finance law which merely requires unions to get the affirmative authorization of **non**union employees who are compelled to pay fees to the union before using any of those forced fees on partisan politics violates the associational rights of unions and their **members**!

II. The Washington Supreme Court's Decision, That the State's Campaign Finance Law Prohibiting Labor Unions and Their Officials from Seizing and Using Nonmembers' Wages for Partisan Political Campaigns Without Obtaining Their Affirmative Consent Violates the First Amendment Rights of Labor Unions, Conflicts with Decisions of the United States Court of Appeals for the Sixth Circuit.

There is a direct conflict between the Washington Supreme Court in this case and the Sixth Circuit in *Michigan State AFL-CIO v. Miller*, 103 F.3d 1240 (6th Cir. 1997), concerning the constitutionality of similar campaign finance legislation. The district court in *Miller*, like the majority here, held that a state law requiring annual affirmative consent of union members[16] for checkoff contributions to a PAC violated the First Amendment rights of unions and their members,

---

[16]The Washington statute only applies the "opt in" requirement to nonmembers, while the Michigan statute applies it to members. However, this difference does not justify the decision of the court below, because if a statute requiring affirmative consent from members does not violate the First Amendment, the union's freedom of association certainly is not implicated by a statute requiring affirmative authorization from only **nonmembers**.

because nonmembers' rights are "appropriately protected" by the "opt out" procedures this Court mandated in *Abood*. *Michigan State AFL-CIO v. Miller*, 891 F. Supp. 1210, 1218 (E.D. Mich. 1995), *rev'd*, 103 F.3d 1240 (6th Cir. 1997).

The Sixth Circuit reversed, finding that the Michigan "opt in" statute did not violate any First Amendment rights of the unions or their members. *Miller*, 103 F.3d at 1250-53. It did so because the "opt in" provision was merely a reasonable regulation of the time, place, and manner of speech subject to the less-exacting intermediate scrutiny standard, not a content-based statute subject to strict scrutiny.[17] Rather than limiting any political expression, an "opt in" statute merely ensures that the political contributions to separate segregated funds by means of mandatory or automatic payroll deductions are voluntary.[18] *Id.* at 1251.

The standard of scrutiny to be applied to the campaign finance statute is another area of direct conflict between the Sixth Circuit and the majority below. The majority below

---

[17]The D.C. Circuit also applied an elevated (intermediate), but not strictest, standard to campaign finance restrictions that do not "directly * * * place limits on any individual's speech or participation in the electoral process." *Machinists v. FEC*, 678 F.2d 1092, 1106 (1982) (*en banc*); *see also id.* at 1107.

[18]Consistent with this Court's holding that unions have no constitutional right to payroll deduction for any reason, including for monopoly bargaining fees, the Sixth Circuit, in another case, held that "there is no constitutional right to wage checkoffs to support political causes." *Pizza*, 154 F.3d at 321-22. This holding is also in conflict with the majority's decision below that the First Amendment prohibits any regulation of the checkoff for partisan politics. If there is no constitutional right to wage checkoffs for political causes, there is no constitutional right to a political checkoff without regulations and conditions. But that is precisely what the majority below held.

improperly applied strict scrutiny, App. A at 22a-23a, 28a-29a, while the Sixth Circuit applied the intermediate scrutiny standard in accordance with this Court's clarification of the applicable tiers of review in *Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622, 640-43 (1994); *see also Madsen v. Women's Health Center*, 512 U.S. 753, 763 (1994); *United States v. O'Brien*, 391 U.S. 367, 377 (1968). The majority below never claimed that § 760 restricts speech on the basis of content, which is a necessary finding for the application of strict scrutiny. By contrast, laws like § 760, "that confer benefits or impose burdens on speech without reference to the ideas or views expressed are in most instances content-neutral." *Turner Broad.*, 512 U.S. at 643.

The Sixth Circuit made the following findings directly contrary to those of the majority of the Washington Supreme Court on these similar "opt in" statutes:

> [T]he Michigan statute does not impose any direct limits on speech. It does not determine who can speak, how much they can speak, or what they may say. [The unions] may continue to raise just as much money now as they could before the annual consent requirement was made applicable to them. * * * Even if contributions were to decline, however, the cause would be the exercise of informed choice by individuals, not the governmental suppression of political advocacy. The governmental interest at stake here is striking a balance between the right to solicit political contributions and the co-equal right not to contribute, an interest wholly unrelated to the suppression of free speech.

Miller, 103 F.3d at 1253.[19]

Likewise, the Sixth Circuit found the administrative burdens of the "opt in" requirement to be minimal, while the majority below found them to be substantial:[20]

> An annual mailing to a union's contributing members, asking them to check a box and to return the notice to the union, would seem to suffice under the statute. Labor unions surely maintain some sort of records on their members already, and requiring the unions to make space in their files or databases for the inclusion of one more piece of information seems

---

[19]The Alaska Supreme Court also upheld its state campaign finance law prohibiting labor unions from making contributions to a political candidate, party, or committee against claims that the prohibitions offended the "political speech rights and associational rights of would-be contributors." *State v. Alaska Civil Liberties Union*, 978 P.2d 597, 613 (Alaska 1999), *cert. denied*, 528 U.S. 1153 (2000); *see also id.* at 608-13. In direct conflict with the majority below the Alaska Supreme Court found that restraints on campaign expenditures by corporations and labor unions have long been part of federal law, and long upheld. *Id.* at 608, 609, 610. The Ninth Circuit also upheld Alaska's ban on corporate and union contributions for similar reasons. *Jacobus v. Alaska*, 338 F.3d 1095, 1122 (9th Cir. 2003). The court did so partly because "[i]n the context of contribution limits, the requirement of 'close tailoring' does not require 'the least restrictive alternative.' *See, e.g., California Med. Ass'n* [*v. FEC*], 453 U.S. [182,] 199 n.20 [(1981)]." 338 F.3d at 1115.

[20]App. A at 16a-18a, 27a-29a. The Sixth Circuit subsequently noted that, although the unions paraded a host of "burdens" in securing the greatest number of contributors, the statute "does not impose any specific method of compliance," and those burdens, even if real, "do not violate the Constitution." *Miller*, 215 F.3d 1327, 2000 WL 712539, at *1, *2 (6th Cir. 2000) (unpublished opinion). "[T]he Constitution, as historically and currently interpreted, does not afford any guarantee against one person or group's ability to fund more speech than can another." *Machinists*, 678 F.2d at 1109.

> minimal, certainly a burden insufficient to rise to the level of a constitutional violation. Similarly, the suggestion that asking people to check a box once a year unduly interferes with the speech rights of those contributors borders on the frivolous.

Id.

In this case there is even less burden, because the union already has to notify all nonmembers annually of their *Hudson* rights. The union could simply include in that package the needed material to demonstrate affirmative consent. Moreover, the State conceded that § 760 does not require the affirmation to be in writing, App. A at 17a, so a telephone response could suffice.

As noted by the Sixth Circuit, another problem with the reasoning of the majority below, that any impairment of the ability of public employees and their unions to raise funds to promote their political agendas and favorite candidates violates the First Amendment, "is that it confuses what citizens and the associations they form may do to support and disseminate their views with what citizens and groups they form my *require* the government to do in this regard." *Pizza*, 154 F.3d at 319. What the unions and the majority below forget is that the First Amendment "'is a source of negative rights against the government, not a repository of positive entitlement to government favors.'" *Id.*, quoting Lillian R. Bevier, *Specious Arguments, Intractable Dilemmas*, 94 Colum. L. Rev. 1258, 1277 (1994).

The Sixth Circuit, not the majority below, is wholly consistent with this Court's cases acknowledging that the protections accorded to fundamental First Amendment rights do not extend to imposing a duty on the government to assist

the exercise of those First Amendment rights, no matter how much the lack of such assistance undercuts the effectiveness of exercising such rights. *See, e.g., Regan v. Taxation with Representation of Washington*, 461 U.S. 540, 545 (1983); *Smith*, 441 U.S. at 465-66; *Pizza*, 154 F.3d at 321.

III. The Washington Supreme Court's Decision Also Conflicts with Relevant Decisions of This Court.

The majority's decision below conflicts with the principles of various decisions of this Court upholding against First Amendment attack campaign finance statutes that place greater restrictions on a union's ability to use members and nonmembers' wages for partisan politics than the limited time, place, and manner regulation that is § 760's affirmative authorization requirement.

The Federal Election Campaign Act of 1971 ("FECA"), 2 U.S.C. § 441b(a), prohibits making union political contributions and expenditures from general union funds. Instead, they must be made from a separate fund (or political action committee ("PAC")) "financed by voluntary contributions." *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652, 671 (1990) (Brennan, J., concurring). Moreover, the FECA prohibits labor PAC solicitation of nonmember union employees. 2 U.S.C. § 441b(b)(4)(A)(ii). This Court has repeatedly upheld these prohibitions against First Amendment attack and spoken approvingly of them,[21] because the potential for disproportionate political influence of corporate and labor

---

[21] *See McConnell v. FEC*, 540 U.S. 93 (2003); *Austin*, 494 U.S. at 656 n.1, 661, 664-65 & n.4; *FEC v. National Right to Work Comm.*, 459 U.S. 197, 198-200 (1982); *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 788 n.26 (1978).

union participation in the political process justifies the regulation. *See Austin*, 494 U.S. at 660-61.

Only a complete ban on political expression, not its mere regulation, raises serious First Amendment concerns. *McConnell v. FEC*, 540 U.S. 93, 204 (2003); see also *Machinists*, 678 F.2d at 1105-07, 1112. Congress' power to prohibit corporations and unions from using their treasury funds for express advocacy in federal elections has been upheld because corporations and unions can form and administer separate segregated funds or PACs, which provide them "with a constitutionally sufficient opportunity to engage in express advocacy." *McConnell*, 540 U.S. at 203; *cf. Washington Educ. Ass'n v. Smith*, 96 Wash. 2d 601, 607-08, 638 P.2d 77, 80-81 (1981) (although RCW 41.04 prohibits voluntary payroll deductions for political contributions and impairs a union's ability to take political action, it is constitutional, because state workers can contribute to PACs by other means). Likewise, § 760 does not prevent unions from engaging in express advocacy, even with nonmembers' agency fees, if nonmembers merely authorize such.

Moreover, the PAC option allows corporate and union political participation "'without the temptation to use corporate [or union] funds for political influence, quite possibly at odds with the sentiments of some shareholders or members, and it lets the government regulate campaign activity through registration and disclosure * * * **without jeopardizing the associational rights of advocacy organizations' members**.'" *McConnell*, 540 U.S. at 204 (quoting *FEC v. Beaumont*, 539 U.S. 146, 163 (2003)) (emphasis added, citations omitted); *accord Pipefitters v. United States*, 407 U.S. 385, 402 (1972). In fact, the FECA, 2 U.S.C. § 431 *et seq.*, and related regulations that bar direct corporate and union contributions in

federal elections, are subject to relatively complaisant First Amendment review, only requiring that the provisions be closely drawn to match a sufficiently important governmental interest, rather than to strict scrutiny. *Beaumont*, 539 U.S. at 161-62.

In addition to preventing corruption or the appearance of corruption, the PAC system has always had a **further duty** and important governmental interest of protecting "the individuals who have paid money into a corporation or union for purposes other than the support of candidates from having that money used to support political candidates to whom they may be opposed." *FEC v. National Right to Work Comm.* ("*NRWC*"), 459 U.S. 197, 208 (1982); *accord United States v. CIO*, 335 U.S. 106, 113 (1948); *see also Austin*, 494 U.S. at 673-78 (Brennan, J., concurring). Accordingly, the Act prohibits unions from financing political funds by "dues, fees, or other moneys required as a condition of membership in a labor organization or as a condition of employment." 2 U.S.C. § 441b(b)(3)(A); *accord* at § 441b(a).

Thus, in the federal system, the statutory protection of individual union members who might oppose the union leadership's political contributions is secured by prohibiting union treasury expenditures on federal elections and requiring voluntary donations from union members for political contributions, *see Pipefitters*, 407 U.S. at 402-13, not by the "opt out" procedure the panel majority required here. As this Court noted: "The dominant concern in requiring that contributions be voluntary was, after all, to protect the dissenting * * * union member." *Id.* at 414-15. Here, the State of Washington has not even gone that far. The State has only protected dissenting **nonmembers** by requiring that their contributions be voluntary.

Under current federal law, union political contributions can only be made from a union PAC, union member contributions to the PAC must be voluntary and knowingly and intentionally given, and the union and its PAC may **not** solicit **nonmembers.**[22] 2 U.S.C. §§ 441b(a), 441b(b)(3), 441b(b)(4)(A)(ii); 11 CFR §§ 114.5(a), 114.5(g)(2); *see also United States v. Boyle*, 482 F.2d 755, 763-64 (D.C. Cir. 1973); *FEC v. National Educ. Ass'n*, 457 F. Supp. 1102 (D.D.C. 1978). Moreover, the Federal Election Commission has specifically determined that an "opting out" system violates the Act. "[E]ven though [membership dues] are refundable upon request of the payor," they are still "monies required as a condition of membership in a labor organization or as a condition of employment," which the Act prohibits unions and their PACs from using for political contributions or expenditures. 11 CFR § 114.5(a)(1); *see also* 2 U.S.C. §§ 441b(a), 441b(b)(3)(A).

---

[22]Many states have similar campaign finance laws that restrict union political solicitations and contributions. *See* Alaska Stat. §§ 15.13.074(f), 15.13.135 (LexisNexis 2004); Ariz. Rev. Stat. Ann. §§ 16-919(B), 16-920, 16-921 (West Supp. 2005); Iowa Code Ann. § 20.26 (West 2001); Md. Code Ann., Elec. Law §§ 13-242 (LexisNexis Supp. 2005), 13-243 (LexisNexis 2002); Mich. Comp. Laws Ann. §§ 169.254, 169.255 (West 2005); Neb. Rev. Stat. Ann. §§ 49-1469, 49-1469.06 (LexisNexis Supp. 2005); N.C. Gen. Stat. Ann. §§ 163-278.19(a) & (b) (LexisNexis 2005); N.D. Cent. Code § 16.1-08.1-03.3 (LexisNexis Supp. 2005); Ohio Rev. Code Ann. §§ 3517.082, 3599.03 (West Supp. 2006); Pa. Cons. Stat. Ann. § 1101.1701 (West 1991); S.D. Codified Laws Ann. §§ 12-25-1(1), 12-25-2 (LexisNexis Supp. 2003); Utah Code Ann. §§ 20A-11-1403 (LexisNexis 2003), 20A-11-1404 (LexisNexis Supp. 2005); Wis. Stat. Ann. § 11.29 (West 2004); Wyo. Stat. Ann. § 22-25-102 (LexisNexis 2005). Some states require written authorization of political deductions. Ohio Rev. Code Ann. § 3599.031(A) (West Supp. 2006); Wyo. Stat. Ann. § 22-25-102(h) (LexisNexis 2005).

Congress' limitation of solicitation of campaign contributions to members of a corporation or union was specifically upheld unanimously by this Court against claims that it violated associational rights. "[W]e conclude that the associational rights asserted by [the corporation] may be and are overborne by the interests Congress has sought to protect in enacting [the Act]." *NRWC*, 459 U.S. at 207. Those interests include protection of

> individuals who have paid money into a corporation or union for purposes other than the support of candidates from having that money used to support political candidates to whom they may be opposed. **We agree with the government that these purposes are sufficient to justify the regulation.**
>
> * * *
>
> We are also convinced that the statutory prohibitions and exceptions we have considered are sufficiently tailored to these purposes to avoid undue restriction on the associational interests asserted by [the corporation].

Id. at 208 (emphasis added, citations omitted). Moreover, as the Court noted, "[t]his careful legislative adjustment of the federal electoral laws * * * to account for the particular legal and economic attributes of corporations and labor organizations **warrants considerable deference**." *Id.* at 209 (emphasis added, citations omitted).

What this Court said about corporate wealth applies equally to union wealth because it too is accumulated with the help of the state, which sets the union up as the monopoly bargaining representative with the power to compel financial support from members and nonmembers alike. "Corporate

wealth can unfairly influence elections when it is deployed in the form of independent expenditures, just as it can when it assumes the guise of political contributions." *Austin*, 494 U.S. at 660.

In sum, Congress can constitutionally 1) prohibit unions from contributing to federal candidates from dues monies, 2) require union members' political contributions to be knowingly and voluntarily made, and 3) prohibit solicitation of political contributions from nonmembers without violating the First Amendment rights of unions, their members, and agency fee payers. *McConnell*, 540 U.S. at 203-04; *NRWC*, 459 U.S. at 207-09; *Mariani v. United States*, 212 F.3d 761, 770-75 (3d Cir. 2000); *Boyle*, 482 F.2d at 763-64. It necessarily follows that the State of Washington is not prohibited from placing time and place restrictions on a union's political use of the compelled fees of nonmembers.

CONCLUSION

For the reasons stated above, this petition for writ of certiorari should be granted, and the case set for plenary briefing and argument on the important questions presented.

Respectfully submitted,

*MILTON L. CHAPPELL
ELLIS, LI & McKINSTRY PLLC
By Steven T. O'Ban

ATTORNEYS FOR PETITIONERS
*Counsel of Record

June 13, 2006

APPENDICES

APPENDIX A

OPINION OF THE SUPREME COURT OF WASHINGTON

16 March 2006

[130 P.3d 352]

Supreme Court of Washington, En Banc.

STATE of Washington ex rel. WASHINGTON STATE PUBLIC DISCLOSURE COMMISSION,
Petitioner,
v.
WASHINGTON EDUCATION ASSOCIATION,
Appellant,
Gary Davenport, Martha Lofgren, Walt Pierson, Susannah Simpson, and Tracy Wolcott, Petitioners, individually and on behalf of all other nonmembers similarly situated,
v.
Washington State Education Association, Respondent.

No. 74268-5, 74316-9.

Argued May 27, 2004.
Decided March 16, 2006.

* * * * *

[354]IRELAND, J.*

¶ 1 In these consolidated cases, we review RCW 42.17.760, which governs a labor union's ability to use agency shop fees, the fees paid by educational employees who are not union members. Both cases stem from an Evergreen Freedom Foundation (Evergreen) complaint with the Public Disclosure

---

* Justice Faith Ireland is serving as a justice pro tempore of the Supreme Court pursuant to Washington Constitution article IV, section 2(a).

Commission (PDC) that the Washington Educational Association (WEA) violated RCW 42.17.760 (hereafter § 760).

¶ 2 In the first consolidated case, the trial court found that WEA had intentionally violated § 760 and assessed $590,375 in penalties and costs. The Court of Appeals reversed, holding that RCW 42.17.760 is unconstitutional. We affirm the Court of Appeals.

¶ 3 In the second consolidated case, plaintiffs contend that chapter 42.17 RCW provides them a private right of action to recover for violations of § 760. Plaintiffs also assert tort claims based on violations of § 760. The trial court agreed that § 760 provides a private right of action, but the Court of Appeals reversed because it had held § 760 unconstitutional. The Court of Appeals remanded the case for dismissal. We affirm the Court of Appeals.

FACTUAL BACKGROUND

¶ 4 WEA is the exclusive bargaining agent for approximately 70,000 Washington State educational employees. Membership in WEA is voluntary. However, both members and nonmembers must contribute to WEA for the costs related to collective bargaining.[1] Per statute, members pay dues to the union;

---

[1] It is well settled that a union, which is obliged to act on behalf of all employees in the bargaining unit, may charge nonunion employees to bear their fair share of the costs of the representation. *Air Line Pilots Ass'n v. Miller*, 523 U.S. 866, 118 S.Ct. 1761, 140 L.Ed.2d 1070 (1998). The dissent takes pains to point out that many states have passed so called "right to work laws" which have not been held unconstitutional. This argument is irrelevant to the issue in this case and inconsistent with

(continued...)

nonmembers pay agency shop fees, which are equivalent to member dues. RCW 41.59.100[2]; RCW 41.56.122.

¶ 5 A portion of members' dues goes to support political and ideological causes, which are unrelated to the union's collective bargaining activities on behalf of all employees. These expenses are typically called nonchargeable expenses. Nonmembers who do not wish to support these nonchargeable activities may obtain a rebate of that portion of their fees that was used for nonchargeable activities. The process by which the union rebates this amount to dissenting nonmembers was established by the United States Supreme Court in *Chicago Teachers Union v. Hudson,* 475 U.S. 292, 106 S.Ct. 1066, 89 L.Ed.2d 232 (1986).

¶ 6 Twice each year, WEA sends a "*Hudson* packet" to each non-member. The *Hudson* packet includes a letter notifying the employee of his or her right to object to paying fees for nonchargeable expenditures. The packet gives the nonmember three choices: (1) pay agency shop fees equivalent to 100 percent of dues; (2) object to paying 100 percent and receive a rebate of nonchargeable expenditures, as calculated by WEA; or (3) object to paying 100 percent and challenge

---

[1] (...continued)
"Washington's long and proud history of being a pioneer in the protection of employee rights." *Drinkwitz v. Alliant Techsystems, Inc.,* 140 Wash.2d 291, 300, 996 P.2d 582 (2000).

[2] RCW 41.59.100 provides, in part: "If an agency shop provision is agreed to, the employer shall enforce it by deducting from the salary payments to members of the bargaining unit the dues required of membership in the bargaining representative, or, for nonmembers thereof, a fee equivalent to such dues."

WEA's calculations of nonchargeable expenditures. The packet also provides financial information about WEA and its activities. During the years 1996 to 2000, WEA had approximately 3,500 nonmembers per year, which is approximately 5 percent of the total number of persons represented by WEA.

¶7 When a nonmember challenges WEA's calculation of nonchargeable expenditures, an arbitrator determines the amount of the nonmember's fees that should be rebated. Pending the outcome of the arbitration, WEA escrows any fees that are reasonably [355] in dispute. The WEA rebates to the employee the amount determined by the arbitrator, and transfers the remainder to the WEA general account. During the years 1996 to 2000, the rebates ranged from $44 to $76. Clerk's Papers (CP) at 839. Nonmembers who did not object and did not request rebates did not receive rebates. Their fees were transferred from escrow to WEA's general account. Political expenditures were made from this account pursuant to a 1996 agreement with the PDC. At issue are the fees paid by the nonobjecting nonmembers.

PROCEDURAL BACKGROUND

¶ 8 This is the latest in a series of actions by Evergreen against WEA. These cases include *State ex rel. Evergreen Freedom Foundation v. Washington Education Ass'n,* 140 Wash.2d 615, 999 P.2d 602 (2000) and *State ex rel. Evergreen Freedom Foundation v. Washington Education Ass'n,* 111 Wash.App. 586, 49 P.3d 894 (2002).

¶9 The current action began in August 2000, when Evergreen filed a complaint with the PDC, alleging that WEA had violated RCW 42.17.760. The complaint asserted that WEA

failed to get the affirmative authorization of all nonmembers before using the nonmembers' fees for political purposes, as required by the statute. In order to avoid yet another lawsuit, WEA entered into a stipulation with the PDC. In that stipulation, WEA acknowledged that it had violated § 760 during the 1999-2000 fiscal year. The PDC referred the case to the attorney general for prosecution.

¶ 10 The State filed suit against WEA in October 2000, alleging WEA had violated § 760 during the previous five years, 1996 to 2000. Both parties moved for summary judgment. The trial court granted the PDC's motion for partial summary judgment, ruling § 760 is constitutional and it "requires affirmative authorization from agency fee payers ... and defendant's *Hudson* procedures do not satisfy this requirement." CP at 349-50. The court ruled that it was a question of fact whether WEA had "used" those agency fees for political purposes. The case proceeded to a bench trial on the issue of whether the WEA had "used" for political purposes the fees of nonmembers who had failed to object by completing and returning the form contained in the *Hudson* packet.

¶ 11 At trial, three experts testified concerning WEA's accounting procedures and whether WEA had used the fees of the nonobjecting nonmembers. Two of the three experts, including the parties' jointly retained expert, testified that WEA had not used the fees of the nonobjecting nonmembers for political expenditures.

¶ 12 However, the trial court concluded that WEA had used those fees. The court assessed a sanction of $200,000, calculated by multiplying $25 by the approximately 4,000 nonmembers who had failed to respond to the *Hudson* packet. The

court then doubled the fine to $400,000, as allowed by RCW 42.17.400(5). The court awarded the PDC costs and fees of $190,375 for a total judgment against WEA of $590,375. The trial court also issued a permanent injunction, precluding WEA from collecting the full amount of agency fees mandated by RCW 41.59.100 and requiring WEA to institute new procedures for segregating the amounts collected from members and the amounts collected from nonmembers.

¶ 13 WEA appealed. On appeal, Division Two of the Court of Appeals held § 760 unconstitutional because its "affirmative authorization requirement unduly burdens unions." *State ex rel. Wash. State Pub. Disclosure Comm'n v. Wash. Educ. Ass'n,* 117 Wash.App. 625, 640, 71 P.3d 244 (2003). The State sought review in this court.

¶ 14 The other consolidated case arose in March 2001, when several educational employees, Gary Davenport, Martha Lofgren, Walt Pierson, Susannah Simpson, and Tracy Wolcott (Davenport), who are not members of the union, filed a class action against WEA on behalf of present or former public school employees. Davenport claims a private right of action under the Public Disclosure Act (PDA). Davenport seeks a refund of that portion of agency shop fees used for political expenditures. Davenport also alleges tort claims for breach of fiduciary duty, conversion, and fraudulent concealment. The trial court dismissed the breach of fiduciary duty claim but denied dismissal of the other **[356]**claims. In addition, the trial court ruled that § 760 provides a private right of action. The trial court then stayed further proceedings while the parties sought interlocutory appeal. The Court of Appeals granted review. After holding § 760 unconstitutional in the consolidated case, the Court of Appeals remanded the Davenport case

to the trial court for dismissal. Davenport petitioned for review in this court.

¶ 15 This court granted the State's and Davenport's petitions for review and consolidated the two cases. We affirm the Court of Appeals.

ISSUES

1. Does WEA's *Hudson* process satisfy RCW 42.17.760's requirement of affirmative authorization?

2. Does the requirement of affirmative authorization render RCW 42.17.760 unconstitutional?

3. Does chapter 42.17 RCW create a private right of action?

ANALYSIS

1. Does WEA's *Hudson* process satisfy RCW 42.17.760's requirement of affirmative authorization?

¶ 16 Enacted in 1992 as part of Initiative 134 (I-134), the Fair Campaign Practices Act, § 760 restricts the ability of unions to use for political purposes the agency fees paid by employees who have not joined the union. Laws of 1993, ch. 2, §§ 1-36. RCW 42.17.760 provides:

> A labor organization may not use agency shop fees paid by an individual who is not a member of the organization to make contributions or expenditures to influence an election or to operate a political committee, unless affirmatively authorized by the individual.

WEA argues that the *Hudson* process satisfies the requirement of affirmative authorization because it provides each individual nonmember the opportunity to object, to obtain a refund, and to prevent fees from being used by WEA, even temporarily, for political purposes. The State contends that the plain language of the statute makes clear that each individual nonmember must provide actual consent and that failure to respond to the *Hudson* packet does not constitute consent.

¶ 17 Prior to this suit, no court had construed the affirmative authorization requirement of § 760. The PDC, the agency charged with implementing the PDA, had not issued any regulations interpreting § 760 or brought any enforcement actions concerning § 760. In addition, despite several requests that the PDC provide guidance to labor organizations on how to comply with § 760's affirmative authorization requirement, the PDC had not given any direction.

¶ 18 In interpreting an initiative, the court looks at the voters intent and the language of the initiative as the average informed lay voter would interpret it. *In re Estate of Hitchman,* 100 Wash.2d 464, 467, 670 P.2d 655 (1983). Words are given their ordinary meaning. *Wash. State Coalition for the Homeless v. Dep't of Soc. & Health Servs.,* 133 Wash.2d 894, 905, 949 P.2d 1291 (1997). If the language used is fairly susceptible to more than one interpretation, the statute is ambiguous. *Sacred Heart Med. Ctr. v. Dep't of Revenue,* 88 Wash.App. 632, 636, 946 P.2d 409 (1997). If the statute is ambiguous, the intent of the electorate may be ascertained from the language of the initiative as well as the official voters pamphlet. *State v. Thorne,* 129 Wash.2d 736, 763, 921 P.2d 514 (1996).

¶ 19 Because § 760 does not define "affirmative authorization," it is unclear whether the *Hudson* process satisfies the authorization requirement. The plain language seems to indicate a nonmember must provide an expression of positive authorization. Failure to respond to the *Hudson* packet may be considered acquiescence, but it would not fulfill the affirmative authorization requirement. The difference is that affirmative authorization seems to indicate that the member must say "yes," instead of failing to say "no."

¶ 20 In this case, the language of the voters pamphlet does not assist us because it also fails to clarify the term "affirmative authorization" and fails to identify what type of authorization was intended. Indeed, the voters pamphlet describes the requirement **[357]**as "individual authorization," not "affirmative authorization."

¶ 21 The State admits that § 760 does not require written authorization. We agree, otherwise the statute would have so stated. Where written authorization is required in the chapter, the statute specifies written authorization. Compare the language of § 760, which forbids the use of nonmember fees in support of political activities "unless affirmatively authorized by the individual," to the language of RCW 42.17.680(3), which forbids deducting "a portion of an employee's wages or salaries for contributions to political committees or for use as political contributions except upon *written* request of the employee." RCW 42.17.680(3)(emphasis added). Where different language is used in different places within a statute, it is presumed there is a difference in intent. *State v. Roberts*, 117 Wash. 2d 576, 586, 817 P.2d 855 (1991). Therefore, not only does § 760 not

require written authorization, we presume that written authorization is not what is intended.

¶ 22 At oral argument, the State was unable to specify what form of authorization would satisfy the requirement of affirmative authorization, except to say that the *Hudson* process was not sufficient. The State asserts that the voters intended to provide to nonmembers more protection of First Amendment rights than is provided under the *Hudson* process approved by the Supreme Court. However, the State has failed to provide any evidence of such intent. The single line in the voters pamphlet concerning the agency shop fees provision does not mention either the constitution or the protection of the nonmember. The voters pamphlet's only reference to the current § 760 is the comment that under I-134, "agency shop fees could not be used for political purposes without individual authorization." This bare description does not indicate what form the authorization should take or whether the *Hudson* process satisfies the requirement of affirmative authorization.

¶ 23 We have previously discussed the intent of the voters in passing I-134. For example, we declared that "[t]he intent of the people of this State in enacting Initiative 134 can be determined from the declarations in RCW 42.17.610 and .620." *Evergreen Freedom Found. v. Wash. Educ. Ass'n,* 140 Wash.2d at 637, 999 P.2d 602. Those declarations of intent indicate that the principal thrust of I-134 was to protect the integrity of the election process from the perception that elected officials are improperly influenced by monetary contributions and the perception that individuals have an insignificant role to play. *Wash. State Republican Party v. Wash. State Pub. Disclosure Comm'n,* 141 Wash.2d 245, 293,

4 P.3d 808 (2000) (Talmadge, J., dissenting). Thus, the intent of the statute is to protect the public, not individual employees. *Crisman v. Pierce County Fire Prot. Dist. No. 21,* 115 Wash.App. 16, 23, 60 P.3d 652 (2002). The requirement of individual authorization does not advance this intent any more than the *Hudson* process.

¶ 24 Where a statute is ambiguous and this court is able to construe it in a manner which renders it constitutional, the court is obliged to do so. *State v. Dixon,* 78 Wash.2d 796, 804, 479 P.2d 931 (1971). However, having construed the statute as requiring more than a nonresponse to a *Hudson* packet, we must next examine the constitutionality of § 760.

2. Does the requirement of affirmative authorization render RCW 42.17.760 unconstitutional?

¶ 25 A party challenging the constitutionality of a statute bears the burden of establishing its unconstitutionality beyond a reasonable doubt. *State ex rel. Heavey v. Murphy,* 138 Wash.2d 800, 808, 982 P.2d 611 (1999). A statute is presumed constitutional, and all doubts are resolved in favor of constitutionality. *Dixon,* 78 Wash.2d at 804, 479 P.2d 931.

¶ 26 The first and fourteenth amendments to the United States Constitution protect the freedom of an individual to associate for the purpose of advancing beliefs and ideas. *Abood v. Detroit Bd. of Educ.,* 431 U.S. 209, 233, 97 S.Ct. 1782, 52 L.Ed.2d 261 (1977); *Elrod v. Burns,* 427 U.S. 347, 355-57, 96 S.Ct. 2673, 49 L.Ed.2d 547 (1976). The practice of persons banding together to make their political voices heard is deeply embedded **[358]**in the American political process. *Citizens Against Rent Control v. City of Berkeley,* 454 U.S. 290, 294,

102 S.Ct. 434, 70 L.Ed.2d 492 (1981). "Its value is that by collective effort individuals can make their views known, when, individually, their voices would be faint or lost." *Id.*

¶ 27 The freedom to associate encompasses the freedom to contribute financially to an organization for the purpose of spreading a political message. *Id.* at 296, 102 S.Ct. 434. "Making a contribution ... enables like-minded persons to pool their resources in furtherance of common political goals." *Buckley v. Valeo,* 424 U.S. 1, 22, 96 S.Ct. 612, 46 L.Ed.2d 659 (1976). Restrictions on expenditures in political campaigning "implicate fundamental First Amendment interests." *Id.* at 23, 96 S.Ct. 612; *see also Wash. State Republican Party,* 141 Wash.2d at 256, 4 P.3d 808.

¶ 28 On the other hand, equally protected is a person's right not to be compelled to support political and ideological causes with which he or she disagrees. *Hurley v. Irish-American Gay, Lesbian, & Bisexual Group,* 515 U.S. 557, 115 S.Ct. 2338, 132 L.Ed.2d 487 (1995). The freedom of association includes the converse right not to be compelled to associate. *Good v. Associated Students of Univ. of Wash.,* 86 Wash.2d 94, 100, 542 P.2d 762 (1975). Freedom of speech includes the freedom not to speak or to have one's money used to advocate ideas one opposes. *Keller v. State Bar of Calif.,* 496 U.S. 1, 110 S.Ct. 2228, 110 L.Ed.2d 1 (1990). "[A]t the heart of the First Amendment is the notion that an individual should be free to believe as he will, and that in a free society one's beliefs should be shaped by his mind and his conscience rather than coerced by the State." *Abood,* 431 U.S. at 234-35, 97 S.Ct. 1782.

¶ 29 In a series of cases, the United States Supreme Court has addressed these competing rights–the right to freely associate for the purpose of political speech and the right to be free from forced association--in the context of the political speech of labor organizations. The result is an approach which strikes a balance between those who disagree with the labor organization's political activities and those who support the political activities. The approach accommodates the dissenting nonmember by providing an easy and prompt method of registering his or her objection and recouping any portion of fees which might otherwise be used by the union for political purposes. At the same time, the approach crafted by the Court makes it simple for one who supports the political causes of the union, whether member or nonmember, to assert his or her right of association.

¶ 30 In *International Association of Machinists v. Street,* 367 U.S. 740, 749, 81 S.Ct. 1784, 6 L.Ed.2d 1141 (1961), the Court considered whether a union "receiving an employee's money should be free, despite that employee's objection, to spend his money for political causes which he opposes." The Court recognized the government's interest in supporting the important role unions play in preserving workplace harmony. Compulsory dues or fees to the union were justified by the union's obligation to represent all employees, whether members or not, as well as the union's desire to avoid free-riders. Therefore, the Court affirmed the union's right to collect fees from all employees who benefit from the union's collective bargaining activities.

¶ 31 The Court held, however, that compulsory union dues may not be used to support political causes if the member disagrees with those causes. On the other hand, "the majority

also has an interest in stating its views without being silenced by the dissenters." *Id.* at 773, 81 S.Ct. 1784.

¶ 32 The Court stated that the appropriate remedy must reconcile the majority and dissenting interests in the area of political expression, protecting both interests "to the maximum extent possible without undue impingement of one on the other," and taking into account the administrative difficulty of accommodating each group. *Id.* Any remedies, however, would properly be granted only to those employees who had made known to the union that they did not desire their funds to be used for political causes to which they object. "[D]issent is not to be presumed--it must affirmatively be made **[359]**known to the union by the dissenting employee." *Id.* at 774, 81 S.Ct. 1784.

¶ 33 In *Abood,* the Court affirmed that the principles of *Street* applied to public employees represented by a collective bargaining agency. The Court held that the union was allowed to use members' dues for purposes other than collective bargaining, provided the money did not come from employees who objected to the causes supported. *Abood,* 431 U.S. at 222, 97 S.Ct. 1782. "[T]he Constitution requires only that such expenditures be financed from charges, dues, or assessments paid by employees who do not object to advancing those ideas and who are not coerced into doing so against their will by the threat of loss of governmental employment." *Id.* at 235-36, 97 S.Ct. 1782. The Court affirmed that the burden is on the employee to make his objection known.

¶ 34 Then in *Hudson* and *Ellis*,[3] while once again affirming that the burden is on the employee to register his dissent to the union's political activities, the Court outlined the procedures that are constitutionally required to safeguard the First Amendment rights of that dissenting employee. An employee who is given a simple and convenient method of registering dissent has not been compelled to support a political cause and has not suffered a violation of his or her First Amendment rights.[4]

¶ 35 With these principles in mind, we consider the constitutionality of the restriction imposed by § 760 on the political speech of the union, its members, and its nonmembers. Regulation of First Amendment rights is always subject to exacting judicial scrutiny. *Citizens Against Rent Control,* 454 U.S. at 294, 102 S.Ct. 434. The State bears the burden of demonstrating that the restriction is narrowly tailored to achieve a compelling governmental interest. *State ex rel. Pub. Disclosure Comm'n v. 119 Vote No! Comm.,* 135 Wash.2d 618, 624, 957 P.2d 691 (1998). "Such burdens are rarely met." *Id.*

¶ 36 Under § 760, the union is prevented from spending any portion of a nonmember's agency fees for political causes

---

[3] *Ellis v. Bhd. of Ry., Airline & S.S. Clerks,* 466 U.S. 435, 104 S.Ct. 1883, 80 L.Ed.2d 428 (1984).

[4] Neither party has provided an analysis or argument to show why, in this context, the state constitutional provision protecting the rights of free speech and association should be construed more broadly than the federal provision. Therefore, we interpret the state constitutional clause coextensively with its parallel federal counterpart. *Nelson v. McClatchy Newspapers, Inc.,* 131 Wash.2d 523, 538, 936 P.2d 1123 (1997).

without the affirmative authorization of the nonmember. The WEA contends, and a majority at the Court of Appeals agreed, that the statute is unconstitutional because its requirement of affirmative authorization amounts to an impermissible presumption that each nonmember objects to the union's use of his or her fees for political activities. The State argues that although the Supreme Court has placed the burden on the dissenting nonmember to *assert* his or her First Amendment rights, it is nevertheless constitutionally permissible for § 760 to shift the burden to the union to *protect* the First Amendment rights of dissenting nonmembers. The Court of Appeals held that by presuming the dissent of nonmembers, § 760 upsets the balance of members' and nonmembers' constitutional rights in the context of a union's expenditures for political activities. Section 760 impermissibly shifts to the union the burden of the nonmembers' rights. This has the practical effect of inhibiting one group's political speech (the union and supporting nonmembers) for the improper purpose of increasing the speech of another group (the dissenting nonmembers).

¶ 37 A presumption of dissent violates the First Amendment rights of both members and nonmembers. The State argues that § 760 has no impact on the First Amendment rights of members because § 760 only requires the affirmative authorization of nonmembers. However, this argument denies the obvious, significant expense involved in complying with § 760. It is disingenuous to argue that § 760 has no impact on members' ability to assert their collective political voice. Campaign finance legislation can create insurmountable organizational and financial hurdles for organizations attempting to engage in political speech, rendering the legislation unconstitutional. *Fed. Election* **[360]***Comm'n v.*

Mass. Citizens for Life, Inc., 479 U.S. 238, 254-55, 107 S.Ct. 616, 93 L.Ed.2d 539 (1986). The weight of the administrative burden on the union is an important consideration in resolving the balance of member and nonmember First Amendment rights. *See, e.g., Waters v. Churchill,* 511 U.S. 661, 671, 114 S.Ct. 1878, 128 L.Ed.2d 686 (1994) (court should consider the cost of procedural safeguards on First Amendment rights); *Grunwald v. San Bernardino City Unified Sch. Dist.*, 994 F.2d 1370 (9th Cir.1993) (requirements of accommodating dissenting nonmembers must be practical). Dissenters may not silence the majority by the creation of too heavy an administrative burden.

¶ 38 In this case, WEA presented evidence that the procedures required by the State's interpretation of § 760 would be extremely costly and would have a significant impact on the union's political activities. *See* Report of Proceedings (RP) at 175-76, 187, 203, 208. The State concedes that written permission is not required. But even without a written permission requirement, the State's position would require individual contact with each nonmember who did not respond to the *Hudson* packet. Therefore, we reject the State's argument that transferring the burden from the dissenting nonmember to the union would have no impact on the union's ability to assert its political voice.

¶ 39 A presumption of dissent violates the First Amendment rights of nonmembers as well. A presumption of dissent fails to respect the nonmember's First Amendment rights as "running both ways." *Wagner v. Prof'l Eng'rs in Calif. Gov't,* 354 F.3d 1036, 1043 (9th Cir.2004). It assumes that because an employee has not joined the union, he or she disagrees with the union's political expenditures. However, there are

numerous and varied reasons why employees choose not to join a union. *Leer v. Wash. Educ. Ass'n,* 172 F.R.D. 439, 446-47 (W.D.Wash.1997) (nonmembers do not have unanimity of purpose). Employees may choose to remain nonmembers for many reasons unrelated to political expression. For those nonmembers who agree with the union's political expenditures, § 760's presumption of dissent presents an unconstitutional burden on their right to associate themselves with the union on political issues. We are bound to provide at least as much protection to the union's members and nonmembers as that provided by the First Amendment: " '[S]tates have no greater power to restrain the individual freedoms protected by the First Amendment than does the Congress." ' *Wash. State Republican Party,* 141 Wash.2d at 264, 4 P.3d 808 (quoting *Wallace v. Jaffree,* 472 U.S. 38, 48-49, 105 S.Ct. 2479, 86 L.Ed.2d 29 (1985)).

¶ 40 Nevertheless, the State argues that we need not adhere to the balance of First Amendment rights as articulated in *Street, Abood,* and their progeny.[5] The State argues that those cases are different because they do not involve a state statute that expressly calls for affirmative authorization of nonmembers. The State also places great emphasis on the fact that § 760 was enacted by the citizens of Washington. However, the voters

---

[5] Similarly, the dissent asserts that balancing members' and nonmembers' rights is a "false" requirement created by the majority, rather than an approach created by the Supreme Court. On the contrary, as other courts have recognized, "the balance of interests underlying all of the Supreme Court's pronouncements on the subject of agency shop fees" must be applied when determining the use of those fees for political purposes. *Weaver,* 970 F.2d at 1533; *see e.g., Miller,* 103 F.3d at 1253 (union's process must strike "a balance between the right to solicit political contributions and the co-equal right not to contribute").

cannot do through initiative what is constitutionally prohibited. *Amalgamated Transit Union Local 587 v. State,* 142 Wash.2d 183, 204, 11 P.3d 762 (2000). In reviewing the constitutionality of a statute, it is irrelevant that a statute is enacted by the voters rather than a legislative body. *Id.*

¶ 41 Moreover, while our state may provide greater protection to its citizens, such as dissenting nonmembers, than is provided by the federal constitution, it cannot do so at the expense of the rights of other citizens, such as members and supporting nonmembers. The State's argument transfers the burden of asserting First Amendment rights from the dissenting nonmembers and places it on the supporting nonmembers and the union. Increased protection for nonmembers, as asserted by the State, tips the scales of First **[361]** Amendment rights in favor of the dissenting nonmember, while increasing the burden on the nonmember who supports the union's political causes and also on the union, which must bear the administrative costs. "[T]he concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment." *Buckley,* 424 U.S. at 48-49, 96 S.Ct. 612.

¶ 42 In addition, there is no indication that in voting for I-134, the voters intended to provide more protection for nonmembers than that offered under federal constitutional principles. Rather, as we have previously stated, the principal thrust of I-134 was to protect the integrity of the election process from the perception that elected officials are improperly influenced by monetary contributions and the perception that individuals have an insignificant role to play.

*Wash. State Republican Party*141 Wash.2d at 293, 4 P.3d 808.

The intent of the statute was to protect the public, not individual employees. *Crisman,* 115 Wash.App. at 23, 60 P.3d 652 (the wording and history of chapter 42.17 RCW indicate that its goal is to protect the public); *see also Nelson,* 131 Wash.2d at 532, 936 P.2d 1123 ("Initiative 134 ... was aimed at repairing the political process.").

¶ 43 The Ninth Circuit engaged in a similar analysis in *Mitchell v. Los Angeles Unified School District,* 963 F.2d 258 (9th Cir.), *cert. denied,* 506 U.S. 940, 113 S.Ct. 375, 121 L.Ed.2d 287 (1992). In *Mitchell,* plaintiffs were nonmembers who, like the nonmembers here, failed to object to the union's use of a portion of agency shop fees for nonchargeable expenditures. The district court issued an injunction, requiring the union to obtain the affirmative consent of each individual nonmember before using that nonmember's fees for political purposes.

¶ 44 The Ninth Circuit reversed, holding that requiring an opt-in system "would unduly impede the union in order to protect 'the relatively rare species' of employee who is unwilling to respond to the union's notifications but nevertheless has serious disagreements with the union's support of its political and ideological causes." *Id.* at 263. The court held it would be an unconstitutional burden to require all those who agree with the union's political activities to affirmatively consent. *Id.* The *Mitchell* court quoted the United States Supreme Court's statement in *Street,* that the union should not be sanctioned in favor of an employee who makes no complaint regarding the use of his or her money. *Id.* at 260. In addition, the court quoted from a California Supreme Court decision that reached the same conclusion in a similar case:

"[E]ach nonmember has a right to prevent the use of his or her service fee for purposes beyond the union's representational obligations. Since ... that additional right is an aspect of the right of an employee to refuse to participate in a union's activities ..., it must be affirmatively asserted or else it is waived." *Id.* at 262 (quoting *Cumero v. Pub. Employment Relations Bd.*, 49 Cal.3d 575, 590, 262 Cal.Rptr. 46, 778 P.2d 174 (1989)).

¶ 45 Likewise, the Sixth Circuit held that the Supreme Court has set out a "hierarchy of interests," which places the burden on the nonmember to make his objection known. *Weaver v. Univ. of Cin-cinnati*, 970 F.2d 1523, 1532 (6th Cir.1992), *cert. denied*, 507 U.S. 917, 113 S.Ct. 1274, 122 L.Ed.2d 668 (1993). The *Weaver* court stated that "[a]n 'opt-in' procedure would greatly burden unions while offering only a modicum of control to nonunion employees whose procedural rights have already been safeguarded by *Hudson*." *Id.* at 1533. An opt-in provision impermissibly shifts the balance of interests underlying all of the Supreme Court's pronouncements. *Id.*

¶ 46 The dissent incorrectly states that the Sixth Circuit has explicitly affirmed the constitutionality of an opt-in statute similar to § 760. Dissent at 8 (citing *Mich. State AFL-CIO v. Miller*, 103 F.3d 1240 (6th Cir.1997)). However, the statute at issue in *Miller* is not similar to § 760. Washington's counterpart to the Michigan statute at issue in *Miller* is RCW 42.17.680(3), which we construed in one of Evergreen's previous suits against WEA. *See State ex rel. Evergreen Freedom Found. v. Wash. Educ. Ass'n*, 140 Wash.2d 615, 999 P.2d 602 (2000). The provision at issue in *Miller* was the Michigan statute's prohibition of reverse checkoff, a **[362]** collection system that automatically deducts

contributions from a member's paycheck without his or her prior approval. Like the Michigan statute at issue in *Miller*, RCW 42.17.680(3) restricts the ability of various groups, including corporations and labor groups, from making direct deductions from an employee's wages. *Miller* did not involve a statute like § 760, and *Miller* is inapplicable to this case.[6]

¶ 47 The United States Supreme Court has held that a union has the right to use nondissenting nonmember fees for political purposes. *Abood*, 431 U.S. at 240, 97 S.Ct. 1782 (quoting *Bhd. of Ry. & S.S. Clerks v. Allen*, 373 U.S. 113, 122, 83 S.Ct. 1158, 10 L.Ed.2d 235 (1963)). The State has failed to even attempt to justify § 760, which it is required to do when regulating First Amendment rights. In fact, a restriction on the First Amendment rights of WEA must be justified by a *compelling* governmental interest. Here, the only interest asserted is additional protection for nonmembers' First Amendment rights. However, there is no indication or

---

[6] The dissent sees no distinction between *Miller* and the current case: However, use of agency shop fees was not at issue in *Miller* and Michigan does not have a statute that specifically applies only to agency shop fees. Furthermore, we note that the primary issue in *Miller* concerned applying to unions the statutory restrictions against reverse checkoff, which were already applied to corporations, nonprofits, and other groups. The *Miller* court held that the Michigan statute "applies evenhandedly" to unions, corporations, and other entities. *Miller*, 102 F.3d at 1251. The parties have not raised, and we do not address, any argument concerning § 760's application solely to labor organizations while nonprofit, corporate, and other groups are not similarly subject to affirmative authorization requirements. *See Austin v. Mich. Chamber of Commerce*, 494 U.S. 652, 110 S.Ct. 1391, 108 L.Ed.2d 652 (1990) (statute that restricts corporate political expenditures, but not labor organization's political expenditures, was justified, in part, by ability of fee payer to avoid paying for political activities of a labor organization whereas shareholders cannot dissociate themselves from corporation's political activities).

argument that WEA is compelling nonmembers to support political activities or preventing nonmembers from asserting their First Amendment rights.

¶ 48 The Supreme Court has indicated that a nonmember has a right to be free from compelled support of a political cause the nonmember does not agree with. As the Supreme Court has held, there is no compelled support if the union utilizes the *Hudson* procedures. Given that there is no compelled support, it does not appear that there is any governmental interference with First Amendment rights of nonmembers for § 760 to protect against. Certainly the State has not provided any evidence of a compelling governmental interest that justifies the restriction on WEA from using the fees of the nondissenting nonmembers.

¶ 49 Judge Robin J. Hunt in her dissent at the Court of Appeals opines that while "opt-in" procedures have not been found to be constitutionally required, the procedure is not constitutionally infirm. *State ex rel. Pub. Disclosure Comm'n v. Wash. Educ. Ass'n,* 117 Wash.App. 625, 644, 71 P.3d 244 (2003) (Hunt, J., concurring in part, dissenting in part). She argues that the cases we cite, *Street, Abood, Mitchell,* and others, create a constitutional floor, but not a ceiling. Even if this argument were accepted, when the State acts in a way that affects the associational and free-speech rights of individuals, in addition to having a compelling reason, its legislation must be narrowly tailored. RCW 42.17.760 is not narrowly tailored especially when examined in light of recent United State [sic] Supreme Court authority.

¶ 50 In *Boy Scouts of Am. v. Dale,* 530 U.S. 640, 120 S.Ct. 2446, 147 L.Ed.2d 554 (2000), the United States Supreme

Court set forth the test for determining whether a government regulation improperly violates a group's right of expressive association. Because § 760 regulates the relationship between the union and agency fee payers with regard to political activity, the *Boy Scouts* analysis should be applied here. Under the *Boy Scouts* test, we must evaluate whether § 760's opt-in provision would significantly burden the union's expressive activity. *Boy Scouts,* 530 U.S. at 653, 120 S.Ct. 2446. If so, then we must analyze whether § 760's opt-in provision is narrowly tailored to support a compelling state interest that is unrelated to the suppression of free speech. *Id.* at 648. We conclude that the union's expressive activity is significantly **[363]**burdened by § 760's opt-in requirement. We also conclude that any compelling state interest in protecting dissenters' rights, could be met by less restrictive means other than the § 760 opt-in procedure. The union's *Hudson* procedures amount to a constitutionally permissible alternative that adequately protects both the union and dissenters. Because RCW 42.17.760 is not narrowly tailored, we hold that the statute is unconstitutional.

¶ 51 The dissent complains that the narrowly tailored issue was not argued or briefed and that we should not rely on *Boy Scouts.* However, this is specifically argued in Respondent WEA's brief to this court. Resp't Br. at 14. That the *Boy Scouts v. Dale* case was not cited does not preclude this court from considering this important case. "[T]his court has the inherent discretionary authority to reach issues not briefed by the parties if those issues are necessary for decision." *Blaney v. Int'l Ass'n of Machinists & Aerospace Workers,* 151 Wash.2d 203, 213, 87 P.3d 757 (2004) (quoting *City of Seattle v. McCready,* 123 Wash.2d 260, 269, 868 P.2d 134 (1994)). Moreover, "[T]his court has frequently recognized it is not

constrained by the issues as framed by the parties if the parties ignore a constitutional mandate, a statutory commandment, or an established precedent." *City of Seattle v. McCready,* 123 Wash.2d 260, 269, 868 P.2d 134 (1994).

¶ 52 In 2000, the United States Supreme Court analyzed whether application of New Jersey's public accommodation law to require the Boy Scouts to admit James Dale, a homosexual gay rights activist, violated the Boy Scouts' First Amendment right of expressive association. *Boy Scouts,* 530 U.S. at 643, 647, 120 S.Ct. 2446. The Court noted that government actions that unconstitutionally burden a group's right of expressive association "may take many forms," one of which was forcing a group to accept certain unwanted members. *Id.* at 648, 120 S.Ct. 2446. The Court then applied a multistep analysis and concluded (1) that the Boy Scouts engaged in expressive activity, (2) that forced inclusion of Dale would significantly burden the Boy Scouts' expression, and (3) that application of New Jersey's public accommodations law in that case ran afoul of the Boy Scouts' constitutional freedom of expressive association. *Id.* at 656, 120 S.Ct. 2446.

¶ 53 While this case involves regulation of the use of agency shop fees, rather than regulation of the group's membership, the essence of RCW 42.17.760 is state regulation of the relationship between the union and agency fee payers with regard to political speech.

¶ 54 Under *Boy Scouts,* in order to determine whether § 760 violates the union's freedom of expressive association, we must first determine whether the union engages in expressive activity. *Boy Scouts,* 530 U.S. at 656, 120 S.Ct. 2446. It is

clear from the record that the WEA engages in political and ideological activities not related to collective bargaining or contract administration. Moreover, § 760 specifically regulates the expenditure of agency shop fees "to influence an election or to operate a political committee." Thus, it seems indisputable that the union engages in expressive activity and § 760 regulates the union's expressive association with agency fee payers. *See Boy Scouts,* 530 U.S. at 650, 120 S.Ct. 2446.

¶ 55 We must next determine whether § 760 opt-in requirement, significantly burdens the union's ability to express its viewpoint. The *Boy Scouts* Court emphasized that courts "must also give deference to an association's view of what would impair its expression." *Boy Scouts,* 530 U.S. at 653, 120 S.Ct. 2446.

¶ 56 RCW 41.59.060(2) provides that if an agency shop agreement becomes effective, a fee that is equivalent to union dues will be deducted from the salary of employees in the bargaining unit. *See also* RCW 41.59.100 (providing for limited exceptions not at issue here). Thus, under the agency shop provisions, the union is entitled to collect a fee equivalent to 100 percent of union dues from nonmembers in the bargaining unit. RCW 41.59.100.

¶ 57 RCW 42.17.760 then encumbers the use of such funds by prohibiting their expenditure for political speech absent affirmative authorization by the agency fee paying nonmember. Notably, the statute acknowledges **[364]**that the fees are in the union's possession but places restrictions upon the *use* of the union's funds for political speech. RCW 42.17.760.

¶58 The union's *Hudson* procedures protect dissenters' rights not to participate in the union's political speech. Twice a year, the union mailed a *Hudson* packet to agency fee payers. The packet contained detailed information about the union's expenditures and the right to object to nonchargeable expenditures. The packet offered three options. A nonmember could: (1) pay agency shop fees equal to 100 percent of union dues, (2) pay agency shop fees, but object to WEA's political expenditures and receive a rebate of nonchargeable expenditures as calculated by the union, or (3) object to the WEA's political expenditures and challenge the WEA's calculation of nonchargeable expenditures before an impartial arbitrator. RCW 42.17.760 significantly changes this process by requiring the union to forgo the use of the portion of agency fees that would go toward political expenditures *unless* the nonmember affirmatively authorizes use for political purposes, rather than allowing the union to use that portion of the agency fee for political speech absent objection.

¶ 59 The union contends that § 760's affirmative authorization requirement significantly burdens its expressive association with nonobjecting agency fee payers. At trial, a union expert testified that it would double the complexity of the dues collection system if fee payers were to pay a different amount than members. The union's additional efforts to attain affirmative authorization would impose further administrative burden. Even if the union were to hold the amount allocated to political activity in escrow while seeking affirmative authorization, the lack of access to those funds could impact the timeliness of the union's political speech. Given the *Boy Scouts* requirement that we give deference to the union's view of what would impair its political expression and given the long recognized, highly protected nature of political speech,

we conclude that RCW 42.17.760 significantly burdens the union's right of expressive association. *See Boy Scouts,* 530 U.S. at 653, 120 S.Ct. 2446; *see also Meyer v. Grant,* 486 U.S. 414, 425, 108 S.Ct. 1886, 100 L.Ed. 2d 425 (1988) (political speech is at the core of the First Amendment freedom).

¶ 60 Finally, we must consider whether RCW 42.17.760 is narrowly tailored to support a compelling government interest that is unrelated to suppression. *Boy Scouts,* 530 U.S. at 648. The protection of dissenters' First Amendment rights is a compelling interest and this interest is not rooted in a desire to suppress the union's political speech for suppression's sake. However, the federal case law previously extensively cited reveals that § 760's opt-in provision is not narrowly tailored to protect this interest. *Hudson,* 475 U.S. 292, 106 S.Ct. 1066; *Abood,* 431 U.S. 209, 97 S.Ct. 1782; *Street,* 367 U.S. 740, 81 S.Ct. 1784; *Weaver,* 970 F.2d 1523; *Mitchell,* 963 F.2d 258. As noted previously, the United States Supreme Court and other federal courts have concluded that a constitutionally acceptable alternative is the opt-out system previously implemented by the union. *See, e.g., Street,* 367 U.S. at 774, 81 S.Ct. 1784; *Abood,* 431 U.S. at 235-36, 97 S.Ct. 1782; *Mitchell,* 963 F.2d at 262-63. Even if these cases do not contain a constitutionally based prohibition *against* opt-in systems, they do reveal a less restrictive alternative means for protecting dissenters' rights. Under the *Boy Scouts* analysis, § 760 significantly burdens the union's expressive association, requiring the statute to survive strict scrutiny. *See Boy Scouts,* 530 U.S. at 648, 120 S.Ct. 2446. The constitutionally acceptable opt-out alternative is significant in that it reveals that protection of dissenters' rights can be achieved through means significantly less restrictive of the union's associational freedoms than RCW 42.17.760's opt-in requirement. *See id.* In

sum, RCW 42.17.760 regulates the relationship between the union and agency fee payers with regard to political expression. Therefore, we apply the framework set forth in *Boy Scouts* to determine whether § 760 violates the union's right of expressive association. The union engages in expressive activity and RCW 42.17.760's opt-in requirement significantly burdens the union's association with agency fee payers with regard to its political speech. Accepting the **[365]**argument that protection of dissenters' rights is a compelling state interest, the opt-out procedure is a less restrictive constitutionally permissible alternative. RCW 42.17.760's opt-in procedure is not narrowly tailored to advance the State's interest in protecting dissenters' rights, and thus, the statute is unconstitutional.

3. Does chapter 42.17 RCW create a private right of action?

¶ 61 Because Davenport's claims in the consolidated case are founded on an alleged violation of § 760, we do not reach either Davenport's claim that chapter 42.17 RCW implies a private right of action or Davenport's tort claims. We therefore affirm the Court of Appeals' remand of Davenport to the superior court for dismissal.

CONCLUSION

¶ 62 We hold that RCW 42.17.760 is unconstitutional. We affirm the Court of Appeals in each case.

C. JOHNSON, MADSEN, BRIDGE, CHAMBERS and OWENS, J.J., concur.

SANDERS, J. (dissenting).

> That to compel a man to furnish contributions of money for the propagation of opinions which he disbelieves and abhors, is sinful and tyrannical.[1]

¶ 63 The majority turns the First Amendment on its head. Unions have a statutory, not constitutional, right to cause employers not only to withhold and remit membership dues but also to withhold and remit fees from nonmembers in an equivalent amount.[2] Absent this statutory mechanism for the withholding and remission of agency fees (or membership fees for that matter), there is no right, constitutional or otherwise, for the union to require it. *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209, 223, 97 S.Ct. 1782, 1793, 52 L.Ed.2d 261 (1977).

---

[1] Thomas Jefferson, *Religious Liberty Guaranteed: Bill for Establishing Religious Freedom, 1779, in* A DOCUMENTARY HISTORY *OF* RELIGION *IN* AMERICA 231 (Edwin S. Gaustad ed., 3d ed.2003) (emphasis omitted).

[2] RCW 41.59.060(2) ("If an agency shop provision is agreed to and becomes effective pursuant to RCW 41.59.100, except as provided in that section, the agency fee equal to the fees and dues required of membership in the exclusive bargaining representative shall be deducted from the salary of employees in the bargaining unit."); RCW 41.59.100 ("A collective bargaining agreement may include union security provisions including an agency shop .... If an agency shop provision is agreed to, the employer shall enforce it by deducting from the salary payments to members of the bargaining unit the dues required of membership in the bargaining representative, or, for nonmembers thereof, a fee equivalent to such dues....").

¶ 64 Many other states have markedly different statutory schemes: Some entirely bar union security agreements and outlaw agency shops as well.[3]

¶ 65 Should the legislature of the State of Washington choose to repeal the mandatory withholding provisions of RCW 41.59.060 and .100, there would be no constitutional impediment to doing so. And no party to this proceeding claims there is.

¶ 66 However the existence of these mandatory withholding statutes does raise a very definite constitutional problem insofar as the statute is used to compel the *nonmember* to support the political advocacy of the union **[366]**without his consent. Nearly every case cited by the majority concerns precisely that eventuality. However that constitutional

---

[3] *See* Ala.Code §§ 25-7-6, 25-7-30 to 25-7-36 (Supp.1992); Ariz.Rev.Stat. Ann. Const. art. XXV (West 1984) and §§ 23-1301 to 23-1303 (West 1995); Ark.Code Ann. §§ 11-3-301 to 11-3-304 (Michie Supp.1996); Fla. Stat. Ann. Const. art. 1, § 6 (West 1991); Ga.Code Ann. §§ 34-6-20 to 34-6-28 (1998); Idaho Code Ann. §§ 44-2001 to 44-2012 (1997); Iowa Code Ann. §§ 731.1 to 731.5 (West 1993); Kan. Stat. Ann. Const. art. 15, § 12 (1988); La.Rev.Stat. Ann. §§ 23:981 to 23:985 (West 1998); Miss.Code Ann. § 71-1-47 (1995); Neb.Rev.Stat. Const. art. XV, § 13 (1995); Nev.Rev.Stat. Ann. §§ 613.230 to 613.300 (Michie 1996); N.C. Gen.Stat. §§ 95-78 to 95- 84 (1997); N.D. Cent.Code §§ 34-01-14, 34-08-04 (1987); S.C.Code Ann. §§ 41-7-10 to 41-7-90 (Law Co-op. 1986); S.D. Codified Laws Const. art. VI, § 2 (Michie 1978) and §§ 60-8-3 to 60-8-8 (Michie 1993); Tenn.Code Ann. §§ 50-1-201 to 50-1-204 (1991); Tex. Lab.Code Ann. §§ 101.051 to 101.053 (West 1996); Utah Code Ann. §§ 34-34-01 to 34-34-17 (1997); Va.Code Ann. §§ 40.1-58 to 40.1-69 (Michie 1994); Wyo. Stat. Ann. §§ 27-7-108 to 27-7-115 (Michie 1997). Thirteen of these states outlaw agency shops as well as union shops. There is no indication that any state has been held to have violated union members' rights by foreclosing mandatory collection of fees from nonmembers.

problem can no longer arise in the state of Washington by virtue of a further statute, RCW 42.17.760, which provides in its entirety:

> A labor organization may not use agency shop fees paid by an individual who is not a member of the organization to make contributions or expenditures to influence an election or to operate a political committee, unless affirmatively authorized by the individual.

¶ 67 There is nothing ambiguous about this statute. No labor organization may use agency fees for political purposes absent "affirmative authoriz[ation]" by the individual. Nonaction or acquiescence is not "affirmative authoriz[ation]."

¶ 68 Given that the legislature could constitutionally repeal the whole statutory scheme allowing withholding in the first place, I find it nearly beyond comprehension to claim that the legislature, or the people acting through their sovereign right of initiative, could not qualify these statutes to ensure their constitutional application.

¶ 69 In short, the majority turns the First Amendment on its head to invalidate a state statute enacted to further protect the constitutional rights of nonunion members who are required to pay agency fees as the price of their employment.

¶ 70 While the First Amendment protects the right to organize and to express ideas on behalf of an organization, it "does not impose any affirmative obligation on the government to listen, to respond, or ... to recognize the association and bargain with it." *Smith v. Ark. State Highway Employees,* 441 U.S. 463, 465, 99 S.Ct. 1826, 1828, 60 L.Ed.2d 360 (1979). *See also Brown v. Alexander,* 718 F.2d 1417, 1421-22 (6th Cir.1983).

Following from this basic premise, there is no constitutional right to have the government deduct union dues (and, by logical extension, agency fees) from paychecks. *Ark. State Highway Employees v. Kell,* 628 F.2d 1099 (8th Cir.1980).

¶ 71 "Although the loss of payroll deductions may economically burden the [union] and thereby impair its effectiveness, such a burden is not constitutionally impermissible." *S.C. Educ. Ass'n v. Campbell,* 883 F.2d 1251, 1256 (4th Cir.1989). "[T]he First Amendment does not impose an affirmative obligation on the state to assist the program of an association by providing payroll deduction services." *Id.* at 1257. The Fourth Circuit, examining whether payroll deductions were constitutionally required, quoted the United States Supreme Court, " '[A] legislature's decision not to subsidize the exercise of a fundamental right does not infringe that right." ' *Id.* at 1256 (quoting *Buckley v. Valeo,* 424 U.S. 1, 96 S.Ct. 612, 46 L.Ed.2d 659 (1976)). The court concluded by stating, "the state's failure to authorize payroll deductions for the [union] does not deny [union] members the right to associate, to speak, to publish, to recruit members, or to otherwise express and disseminate their views." *Id.* at 1257.

¶ 72 The Ohio legislature eliminated wage checkoffs for the support of any "candidate, separate segregated fund, political action committee, legislative campaign, political party, or ballot issue." Ohio Rev.Code § 3599.031(H). The United States Court of Appeals for the Sixth Circuit found this constitutional. *Toledo Area AFL-CIO Council v. Pizza,* 154 F.3d 307, 319-21 (6th Cir.1998).

¶ 73 Therefore, it would be perfectly constitutional if the State chose to eliminate the payroll deduction for collection of

agency shop fees altogether. How then could merely placing a procedural condition on the collection of a small portion of such shop fees (those that would be used to influence an election or to operate a political committee) violate the constitution?

¶ 74 The majority chooses not to address this line of cases. Instead it distorts cases delineating the requirements protecting dissenting union members and nonmembers from having their dues used to support political activities with which they disagree to do the opposite: limit the State's ability to protect such dissenters.

¶ 75 Simply put, all of the cases cited by the majority involve claims by dissenters that certain steps were required to protect their constitutional right *not* to associate and not to have their money spent supporting political [367]positions with which they dis-agreed.[4] I cannot improve upon Judge Hunt's dissent from the case below: "[T]hese cases do not support the converse, advanced by the majority here, that an 'opt-in' provision such as Washington's is constitutionally barred." *State ex rel. Wash. State Pub. Disclosure Comm'n v. Wash. Educ. Ass'n,* 117 Wash.App. 625, 642, 71 P.3d 244 (2003)

---

[4] *Mitchell v. Los Angeles Unified School District,* 963 F.2d 258 (9th Cir.1992) is no different. That case concerned the First Amendment *right of nonunion employees* to withhold financial support from union political activity. The court held the constitutional right of the nonunion employees was adequately protected by an opportunity to "opt-out" of full dues payment through an agency fee. The constitutional rights of the union were never at issue.

(Hunt, J., dissenting).[5] Judge Hunt's learned dissent cogently analyzes each of the cases relied upon by the majority and reaches the correct conclusion.[6]

¶ 76 Our majority takes "dissent is not to be presumed"[7] out of the context in which it was written--the context of unions categorically violating the rights of dissenters. That language simply served to limit the actions a union must undertake *in the absence of a sta-tutory scheme.* The holdings of all the cases cited by the majority amount to a simple proposition: the constitution requires *at least* an opt-out scheme to protect

---

[5] *See also* IRVING M. COPI & CARL COHEN, INTRODUCTION TO LOGIC 219-20 (9th ed.1994) (converse of a given proposition not necessarily valid).

[6] *See State ex rel. Wash. State Pub. Disclosure Comm'n,* 117 Wash.App. at 642-44, 71 P.3d 244 (Hunt, J., dissenting), analyzing *Int'l Ass'n of Machinists v. Street,* 367 U.S. 740, 81 S.Ct. 1784, 6 L.Ed.2d 1141 (1961); *Bhd. of Ry. & S.S. Clerks v. Allen,* 373 U.S. 113, 83 S.Ct. 1158, 10 L.Ed.2d 235 (1963); *Abood,* 431 U.S. 209, 97 S.Ct. 1782; *Ellis v. Bhd. of Ry.,* 466 U.S. 435, 104 S.Ct. 1883, 80 L.Ed.2d 428 (1984); *Mitchell,* 963 F.2d 258. While Judge Hunt did not examine *Weaver v. University of Cincinnati,* 970 F.2d 1523 (6th Cir.1992), that case arose in the identical context to the others: a claim that certain procedures, such as affirmative consent, were constitutionally *required* to protect dissenters' rights. *See Weaver,* 970 F.2d at 1531. All of these cases dealt with the constitution a floor--a minimum level of process needed to protect dissenters' rights. None of these cases dealt with the constitution as a ceiling limiting the discretion of legislators, or the people acting as legislators, in providing further protection to dissenters.

[7] *Street,* 367 U.S. at 774, 81 S.Ct. 1784; *Abood,* 431 U.S. at 238, 97 S.Ct. 1782.

dissenters' rights. [8] None of these cases stand for the proposition that the constitution limits a different legislative approach to protecting dissenters' rights, including an opt-in scheme.

¶ 77 From the majority's misconstruction of the "dissent is not to be presumed" language a false "balance" requirement is invented. Other than general paeans to the right of association, the majority cites no other precedent for its holding that the "balance" between the associational rights of dissenters and nondissenters is upset by requiring one to register assent, rather than register dissent.[9] Again, if the elimination **[368]**of

---

[8] Even the language quoted by Justice Ireland demonstrates this: " '[T]he Constitution *requires* only that such expenditures be financed from charges, dues, or assessments paid by employees who do not object." ' Majority at 17 (quoting *Abood,* 431 U.S. at 235-36, 97 S.Ct. 1782) (emphasis added). Further, *Abood* was a plurality opinion, and the concurring justices either explicitly chose not to address alternative remedies for the violations of dissenters' rights, remedies such as RCW 42.17.760 (*see Abood,* 431 U.S. at 244, 97 S.Ct. 1782 (Stevens, J., concurring)), or explicitly stated that the constitution does not *require* employees to "declare their opposition to the union and initiate a proceeding" in order to vindicate their First Amendment rights. *Abood,* 431 U.S. at 245, 97 S.Ct. 1782 (Powell, J., concurring).

[9] And even the cases cited as interpreting the "presumption of dissent" are misrepresented. *Wagner v. Professional Engineers in California Government,* 354 F.3d 1036, 1043 (9th Cir.2004) is cited for the proposition that "[a] presumption of dissent fails to respect the nonmember's First Amendment rights as 'running both ways." ' Majority at 21 (quoting *Wagner,* 354 F.3d at 1043). Yet the issue discussed in that section of *Wagner* was whether the proper remedy for an inadequate *Hudson* notice (where no statutory scheme required assent prior to use) was return of the nonchargeable amounts to all fee payers, including those who did not object, or whether the proper remedy was a new, proper notice with a renewed opportunity to object and then to receive a refund with interest.

(continued...)

a payroll deduction does not abridge the constitutional rights of union members and nonobjecting nonmembers to associate, it is inconceivable that requiring assent as a precondition to using funds generated by a payroll deduction abridges such rights.

¶ 78 In fact, an "opt-in" legislative scheme has explicitly been constitutionally upheld. In *Michigan State AFL-CIO v. Miller*, 103 F.3d 1240 (6th Cir.1997), the Sixth Circuit upheld a statute that read:

> "[A] labor organization may solicit or obtain contributions for a separate segregated fund ... on an automatic basis, including but not limited to a payroll deduction plan, only if the individual who is contributing to the fund *affirmatively consents to the contribution* at least once in every calendar year."

Id. at 1248-1249 (quoting Mich. Comp. Laws Ann. § 169.255(6) (West 1966)).

¶ 79 The statutory scheme in Michigan prohibited labor unions from making political contributions from general funds, requiring them to maintain a "segregated" fund for such contributions. *Id.* at 1244. Thus, in order to solicit or obtain funds that would be used for political purposes–even from its own members, let alone nonmembers–the union had to obtain "affirmative consent" for the deduction every calendar year.

---

[9] (...continued)
The case had nothing to do with whether requiring assent prior to use of nonobjecting nonmembers' payroll deductions was constitutional. Indeed, the case stresses protection of dissenters in absence of a statutory scheme protecting them: "The fundamental right at issue is the right to be informed before making a choice whether to pay for non-chargeable expenditures." *Wagner*, 354 F.3d at 1043.

¶ 80 This is a more restrictive scheme than the Washington statute at issue since it applies to all union members while the Washington statute applies only to nonmembers.[10] But the statute mirrors Washington's in requiring "affirmative consent"–substantively identical to "affirmative authorization"–before using payroll deductions for political purposes. And even given the Michigan statute's broader effects in applying to union members, the Sixth Circuit stated:

> [T]he suggestion that asking people to check a box once a year unduly interferes with the speech rights of those contributors borders on the frivolous.

Id. at 1253.

¶ 81 The majority's treatment of this case borders on the inexplicable. It claims that the primary issue in *Miller* was the equal app-lication of the reverse checkoff to unions, corporations, non-profits, and other groups. Majority at 26 n. 6. It was nothing of the sort. The three sections of the opinion are labeled "Facts" (*id.* at 1243), "Intervention" (*id.* at 1245), and "The First Amendment and § 169.255(6)" (*id.* at 1248). There are no sections involving equal protection challenges.[11]

---

[10] The majority's attempt to distinguish *Miller* on the basis that Washington has a statute, RCW 42.17.680(3), limiting union members' payroll deductions is baffling. The fact that Washington also has a statute regulating union member payroll deductions (though in a different manner than Michigan's) doesn't affect the central premise of *Miller*– that an "opt -in" system regarding payroll deductions does not violate the First Amendment.

[11] The challenge in *Miller* was to both associational and speech rights. *Miller,* 103 F.3d at 1250. Similarly, the majority frames the issue in both political speech and associational terms. Majority at 13-14. But while the majority chooses to focus on the line of United States Supreme Court cases concerning associational (and nonassociational) rights, the

(continued...)

¶ 82 As *Miller* recognized, the suggestion that a legislative choice to protect dissenting nonmembers by requiring affirmative authorization before using their agency shop fees to influence an election or to operate a political committee violates the First Amendment to the United States Constitution "borders on the frivolous."

¶ 83 The majority claims this statute violates the First Amendment associational **[369]**rights of the *union,* citing *Boy Scouts of Am. v. Dale,* 530 U.S. 640, 120 S.Ct. 2446, 147 L.Ed.2d 554 (2000).

¶ 84 This argument's flaw is at its foundation: association is a two way street requiring a mutual desire to associate by all concerned. But here nonunion employees have elected *not* to associate. This does not violate the associated rights of the union or its members since it had no constitutional right to compel membership much less monetary support from nonmembers in the first place.

---

[11] (...continued)
Sixth Circuit focused on the free speech cases. Under that line of cases, the Sixth Circuit looked at whether the requirement of affirmative consent for a payroll deduction was a content-neutral restriction on the potential speech of union members who would have been funded by the payroll deduction. *Id.* at 1250-53. The majority determined that the restriction on speech was content-neutral, and in making that determination the court examined whether the statute was an invidious "attempt to limit contributions made to separate segregated funds or to favor one class of voters over another." *Id.* at 1251. The court determined that there was no invidious purpose because the "statute applies evenhandedly." *Id.* I of course agree that there is no violation of free speech rights in limiting a payroll deduction system and of course no violation of associational rights, as outlined above.

¶ 85 Moreover, this argument for unconstitutionality was never advanced by the parties and is therefore not properly considered by the court. *See* RAP 9.12 (limiting review of summary judgment to "evidence and issues called to the attention of the trial court"); *see also Nelson v. McGoldrick,* 127 Wash.2d 124, 140, 896 P.2d 1258 (1995); *Simpson Tacoma Kraft Co. v. Dep't of Ecology,* 119 Wash.2d 640, 649, 835 P.2d 1030 (1992) (refusing consideration of issues not raised before trial court); *cf. Tiffany Family Trust Corp. v. City of Kent,* 155 Wash.2d 225, 240, 119 P.3d 325 (2005) (refusing consideration of 42 U.S.C. § 1983 claim raised only in reply brief).

¶ 86 However even if it is properly before the court, it is not meritorious since this statute does not apply to union members only nonmembers who must pay agency fees because of their *refusal* to join the union. The right of these nonunion employees to refuse to join the union is itself protected by the First Amendment right of association as " '[f]reedom of association ... plainly presupposes a freedom not to associate." ' *Boy Scouts,* 530 U.S. at 563, 120 S.Ct. 2446; *Good v. Associated Students of Univ. of Wash.,* 86 Wash.2d 94, 104, 542 P.2d 762 (1975). *Boy Scouts* protected the right of nonassociation. Were this statute to apply to union dues from voluntary union members, the analysis might be arguable. But it doesn't, and it isn't.

¶ 87 The majority confuses the analysis further by referring to "the union's expressive association with agency fee payers," majority at 363, and "its [union's] expressive association with nonobjecting agency fee payers." *Id.* at 364. But there is *no* association between the union and agency fee payers because by definition these individuals have refused to join (associate

with) the union. The absence of membership defeats any claim that the regulation of statutorily required monetary support can possibly violate the right of union members to freely associate with one another for political advocacy. Rather it puts in jeopardy the First Amendment right of nonmembers to refuse to associate with a union which uses their money to advance a political agenda with which they might disagree. *That* is the concern of the First Amendment in this context, as it is the even more protective concern of RCW 42.17 .760.

> "Our Government has no more power to compel individuals to support union programs or union publications than it has to compel the support of political programs, employer programs or church programs. And the First Amendment, fairly construed, deprives the Government of all power to make any person pay out one single penny against his will to be used in any way to advocate doctrines or views he is against, whether economic, scientific, political, religious or any other."

Good, 86 Wash.2d at 101, 542 P.2d 762 (quoting *Int'l Ass'n of Machinists v. Street,* 367 U.S. 740, 791, 81 S.Ct. 1784, 6 L.Ed.2d 1141 (1961) (Black, J., dissenting)).

¶ 88 I dissent.

ALEXANDER, C.J., and FAIRHURST, J., concur.

APPENDIX B

UNPUBLISHED OPINION OF THE COURT OF APPEALS OF WASHINGTON

24 June 2003

[117 Wash. App. 1035]
Court of Appeals of Washington, Division 2
Gary DAVENPORT, Martha Lofgren, Walt Pierson, Susannah Simpson, and Tracy Wolcot,
Respondents,
v.
WASHINGTON STATE EDUCATION ASSOCIATION,
Appellant.
No. 28375-1-II.
June 24, 2003.

* * * *

UNPUBLISHED OPINION

BRIDGEWATER, J.

This case was brought by nonunion public school employees who paid agency fees to the Washington Education Association (WEA). Plaintiffs filed a class action lawsuit to recover the fees that WEA used, without their authorization, for political purposes. But plaintiffs did not object to the use of their fees for purposes other than collective bargaining.

The trial court ruled that plaintiffs had an implied right of action under RCW 42.17.760.[1] It granted class certification to

---

[1] The statute provides:
'A labor organization may not use agency shop fees paid by an individual who is not a member of the organization to make contributions or expenditures to influence an election or to operate a political committee, unless affirmatively authorized by the individual.'

(continued...)

plaintiffs on the violation of RCW 42.17.760 and conversion claims. We granted discretionary review to determine if the trial court erred.

The basis of plaintiffs' claim is RCW 42.17.760, which states that before a labor union could use a nonunion employee's agency fees for political purposes, that employee needed to give his or her affirmative authorization. Because we hold today in *State ex rel. Washington State Public Disclosure Commission v. Washington Education Association,* No. 28264-0-II (Wash. Ct.App. June 24, 2003), that RCW 42.17.760 is unconstitutional, plaintiffs, as non-objecting, nonunion employees, lose standing to sue for their un-refunded agency fees.

Reversed and remanded for dismissal.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record pursuant to RCW 2.06.040, it is so ordered.

I concur: MORGAN, P.J.

HUNT, C.J.
I concur in the majority's reversal but disagree with their reliance on WEA v State, No. 28264-0-II, (Wash. Ct.App., filed June 24, 2003), in which I dissented from the majority's holding that RCW 42.17.760 unconstitutional. Instead, I would reverse based on our recent holding in *Crisman v.*

---

[1] (...continued)
RCW 42.17.760 (emphasis added).

Pierce County Fire Protection District No. 21, 115 Wn.App. 16, 24, 60 P.3d 652 (2002), that '42 .17 RCW does not imply a private cause of action.'[2]

As we noted in Crisman, RCW 42.17.400(1) 'allows a citizen to bring an enforcement action, but only after notice to and failure by the attorney general and the prosecuting attorney to act.' *Crisman,* 115 Wn.App. at 22 (emphasis added). See also RCW 42.17.400(4). Davenport and the other plaintiffs here, however, do not fall within this exception because they did not file the required notice with the Public Disclosure Commission, the Attorney General, or the prosecuting attorney. Therefore, they have not fulfilled the prerequisite for filing a private action under RCW 42.17. *Crisman,* supra.

Accordingly, I concur in the result only.

---

[2] The trial court here did not have the benefit of our subsequent ruling in Crisman when it ruled that 42.17 RCW implies a private cause of action.

APPENDIX C

ORDER OF THE
SUPERIOR COURT OF THE
STATE OF WASHINGTON

18 January 2002

[file stamp omitted in printing]

Judge Daniel J. Berschauer
Hearing date: January 18, 2002

IN THE SUPERIOR COURT
OF THE STATE OF WASHINGTON
IN AND FOR THURSTON COUNTY

GARY DAVENPORT, MARTHA LOFGREN, WALT PIERSON, SUSANNA SIMPSON, and TRACY WOLCOTT,	) No.01-2-00519-4
Plaintiffs, individually and on behalf of all other nonmembers similarly situated,	) CONSOLIDATED ORDER ON PENDING MOTIONS
v.	
WASHINGTON EDUCATION ASSOCIATION,	
Defendant.	

This matter coming on to be heard upon several motions: Defendant's Motion to Dismiss Claims, Plaintiffs' Motion for Class Certification, and Defendant's Motion To Stay Proceedings, the Court having considered and ruled orally on each of said Motions, and the Court having encouraged the parties to seek interlocutory appeal of said issues, for purposes

of such appeal, the Court hereby enters this Consolidated Order disposing of all said Motions.

With regard to Defendant's Motion to Dismiss, the Court considered the following:

1. Defendant's CR 12(c) Motion to Dismiss Claims;
2. Plaintiffs' Response to Motion to Dismiss Claims;
3. Declaration of Jeanne Brown and attached exhibits.
4. Defendant's Reply in Support of Motion To Dismiss Claims;
5. Declaration of Aimee S. Iverson and exhibits thereto.

With regard to Plaintiffs' Motion for Class Certification pursuant to CR 23, the Court considered the following:

1. Plaintiffs' Motion for Class Certification;
2. Declaration of Milton L. Chappell and exhibits thereto;
3. Defendant's Response to Plaintiffs' Motion for Class Certification;
4. Declaration of Judith A. Lonnquist and exhibits thereto;
5. Declaration of Aimee Iverson and exhibits thereto;
6. Plaintiffs' Reply to Defendant's Response to Plaintiffs' Motion for Class Certification;
7. Declaration of Milton L. Chappell in Support of Plaintiffs' Reply to Defendant's Response to Plaintiffs' Motion for Class Certification and exhibits thereto;
8. Plaintiffs' Supplemental Motion for Class Certification;
9. Defendant's Response to Plaintiffs' Supplemental Motion for Class Certification;
10. Declaration of Judith A. Lonnquist and exhibits thereto; and

11. Plaintiffs' Reply to Defendant's Response to Plaintiffs' Supplemental Motion for Class Certification.

With regard to Defendant's Motion To Stay of Proceedings, the Court considered the following:

1. Defendant's Motion To Stay Proceedings;
2. Declaration of Harriet K. Strasberg and exhibits thereto;
3. Plaintiffs' Response to Defendant's Motion to Stay Proceedings and exhibits attached;
4. Defendant's Reply in Support of Motion To Stay Proceedings.

The Court heard oral argument on the Motion to Dismiss Claims and the Class Certification motion on October 12, November 2 and December 7, 2001, respectively, and declined oral argument on the Motion to Stay. The Court has considered the above-described submissions as well as the argument of counsel, and makes the following rulings:

IT IS HEREBY ORDERED that Defendant's Motion to Dismiss Claims is DENIED, except as to Plaintiffs' Third Cause of Action for Breach of Fiduciary Duty which is hereby DISMISSED, with prejudice; and

IT IS FURTHER ORDERED that the applicable statute of limitations for Plaintiffs' claim under RCW 42.17.760 is five years, pursuant to RCW 42.17.410, and for the remaining claims is three years, pursuant to RCW 4.16.080.

IT IS FURTHER ORDERED that:

1. As to the first cause of action – violation of RCW 42.17.-760 – and the second cause of action – conversion – the Court certifies that under CR 23(b)(3) a plaintiff class of all public school employees who, between March 19, 1996 and August 31, 2001 (inclusive), were nonmembers paying agency shop fees to Defendant WEA without receiving a reduction or

refund for the amount WEA used to influence an election or to operate a political committee, for which the nonmembers had not given authorization.

2. As to the fourth cause of action – fraudulent concealment – the Court denies certification of a plaintiff class because the Court has found that the individual claims of reliance predominate over the common claims.

3. Pursuant to CR 23(c)(2), Defendant shall distribute an individual "opt-out" class notice, approved by the Court, to each member of the class who can be identified through reasonable effort.

IT IS FURTHER ORDERED THAT: all proceedings before this Court, including the class notice distribution referenced in paragraph 3 above, are stayed until 2/12/02 to allow either party to seek an interlocutory appeal, at the end of which time the stay shall expire, unless it is extended by the Court upon motion of either party, or by the Court *sua sponte*.

IF IS FURTHER ORDERED THAT: this Consolidated Order supersedes any previous order entered by this Court with respect to the issues addressed herein.

THE COURT takes judicial notice of the fact that a decision has been rendered in ***State of Washington ex rel. PDC v. WEA,*** Thurston County Cause No. 00-2-01837-9, which may affect the outcome of certain issues herein. The Court has been advised that an appeal thereof has been filed. The Court finds that it would conserve resources of the court and the parties if the issues determined herein were reviewed at the same time as the issues in the ***PDC*** case.

THE COURT FINDS THAT pursuit of this case, while the ***PDC*** case is appealed, especially as a class action, would be costly to the parties, drain public resources, and that an interlocutory appeal would be appropriate herein.

ACCORDINGLY, THE COURT HEREBY CERTIFIES THAT this Consolidated Order involves controlling questions of law as to which there are substantial grounds for differences of opinion and that immediate review of this Consolidated Order would materially advance the ultimate termination of the litigation.

DONE IN OPEN COURT this 18 day of January, 2002.

/s/ Daniel J. Berschauer
Judge Daniel J. Berschauer

Presented by:

/s/ Judith A. Lonnquist
Judith A. Lonnquist, WSBA #0621

/s/ Harriet Strasberg
Harriet K. Strasberg, WSBA #15890

/s/ Aimee Iverson
Aimee Iverson, WSBA #28610

Attorneys for Defendant WEA

Approved as to form; notice of presentation waived:

Steven T. O'Ban, WSBA #17265

Milton L. Chappell, *Pro Haec Vice* [sic]

Attorneys for Plaintiffs

APPENDIX D

OPINION OF THE
COURT OF APPEALS OF WASHINGTON

24 June 2003

[117 Wash. App. 625, 71 P.3d 244]
Court of Appeals of Washington,
Division 2.
STATE of Washington ex rel. WASHINGTON STATE PUBLIC DISCLOSURE COMMISSION,
Respondent,
v.
WASHINGTON EDUCATION ASSOCIATION,
Appellant.
No. 28264-0-II.

June 24, 2003.

* * * *

[627] [245] BRIDGEWATER, J.

The State sued the Washington Education Association (WEA) alleging that it had violated RCW 42.17.760 by using non-union employees' (nonmembers) agency fees to make political expenditures without their affirmative authorization. Based on U.S. Supreme Court caselaw that (1) mandates a balancing between members' and nonmembers' First Amendment free speech and association rights, and (2) approves of a procedure that requires nonmembers to exercise their rights by objecting or "opting out," we hold that RCW 42.17.760 is unconstitutional because, by requiring an "opt in" procedure, it presumes that nonmembers object to the use of their fees for political purposes. Accordingly, we reverse.

WEA is a labor organization and the exclusive bargaining representative for some 70,000 Washington public educational employees. As bargaining representative, WEA has a statutory duty to represent every employee in the bargaining

unit, members and nonmembers alike. [1] The collective bargaining **[246]**agreement between WEA and the State includes an agency shop provision that requires all nonmembers to pay service fees; nonmembers are employees who are in the bargaining unit but who choose not to join WEA. Less than five percent of Washington public educational employees choose to be nonmembers.

Forcing nonmembers to contribute money to a labor union amounts to compelled association with the union and **[628]**impacts[2] their First Amendment free speech and association rights.[3] The First Amendment provides: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances."[4] Nevertheless, the State's interest in facilitating collective bargaining and preventing free riders justifies the compelled association. [5] Free riders are "employees in the bargaining unit on whose behalf the union

---

[1] RCW 41.59.090.

[2] *See Abood v. Detroit Bd. of Educ.*, 431 U.S. 209, 222, 97 S.Ct. 1782, 52 L.Ed.2d 261 (1977) ("To compel employees financially to support their collective-bargaining representative has an impact upon their First Amendment interests.").

[3] *See Roberts v. United States Jaycees*, 468 U.S. 609, 622-23, 104 S.Ct. 3244, 82 L.Ed.2d 462 (1984).

[4] U.S. CONST. amend. I.

[5] *Abood*, 431 U.S. at 220-22, 97 S.Ct. 1782.

[is] obliged to perform its statutory functions, but who refus[e] to contribute to the cost thereof."[6]

Members pay dues to WEA; nonmembers pay agency fees.[7] But under RCW 41.59.060(2) and RCW 41.59.100, agency fees are equivalent to member dues.[8]

A union's expenditures fall into two categories: (1) chargeable expenditures, those related to collective bargaining and representational activities; and (2) non-chargeable expenditures, those unrelated to collective bargaining, including political and ideological expenditures. Because nonmembers pay fees that are equivalent to member dues, they are, in effect, contributing funds for non-chargeable and political expenditures. This also impacts nonmembers' constitutional rights because nonmembers are compelled to make contributions for political purposes.[9]

[629]Under WEA's current practices, nonmembers who object to paying fees for the union's non-chargeable expenditures (objectors) are required to pay only the chargeable portion of the fee, the fair share fee. WEA annually calculates the fair share fee.

---

[6] *Ellis v. Bhd. of Ry., Airline & S.S. Clerks, Freight Handlers, Express & Station Employees,* 466 U.S. 435, 447, 104 S.Ct. 1883, 80 L.Ed.2d 428 (1984).

[7] *See* RCW 41.59.060(2); RCW 41.59.100.

[8] *Leer v. Wash. Educ. Ass'n,* 172 F.R.D. 439, 442 (W.D.Wash.1997).

[9] *See Abood,* 431 U.S. at 234, 234 n. 31, 97 S.Ct. 1782.

Each fall, WEA sends letters to nonmembers notifying them of their right to object to paying fees for non-chargeable expenditures and to challenge WEA's calculation of the fair share fee. The letters include deadlines and detailed financial information regarding WEA's expenditures so that nonmembers can decide whether to object. When nonmembers object, an arbitrator determines the fair share fee. Pending the outcome of the arbitration, WEA escrows any fees that are reasonably in dispute. WEA refunds to objectors the non-chargeable portion of the fee.

Nonmembers who do not object to paying fees for non-chargeable expenditures (non-objectors) do not receive refunds. Instead, their fees are transferred from escrow to WEA's general account and commingled with member dues. WEA makes its non-chargeable expenditures from that account.

In August 2000, the Evergreen Freedom Foundation (EFF) filed a complaint with the Public Disclosure Commission (PDC) under RCW 42.17.400(4). EFF alleged that WEA was violating RCW 42.17.760 by using agency fees to make political expenditures without nonmembers' affirmative authorization. RCW 42.17.760 provides:

> **[247]**A labor organization may not *use* agency shop fees paid by an individual who is not a member of the organization to make contributions or expenditures to influence an election or to operate a political committee, unless *affirmatively authorized* by the individual.[10]

---

[10] RCW 42.17.760 (emphasis added).

To avoid another lawsuit with EFF,[11] WEA entered into a stipulation with the PDC acknowledging that it violated **[630]**RCW 42.17.760 during its 1999-2000 fiscal year. The PDC referred the matter to the Attorney General's Office for prosecution, believing that its administrative penalty was insufficient to address the stipulated violations. A larger penalty is available in superior court.[12]

The State sued WEA, alleging that it violated RCW 42.17.760 during the previous five years, 1996 to 2000.[13] Both parties moved for summary judgment.

The superior court granted the State's motion for partial summary judgment, ruling that RCW 42.17.760 requires affirmative authorization from nonmembers before a union may either collect or use agency fees for political expenditures. The court also denied WEA's motion for summary judgment, ruling that RCW 42.17.760 is constitutional, that it did not unconstitutionally amend RCW 41.59.100, and that WEA's fee collection procedures did not satisfy RCW 42.17.760's affirmative authorization requirement. The superior court reserved for trial the issue of

---

[11] *See, e.g., State ex rel. Evergreen Freedom Found. v. Wash. Educ. Ass'n,* 140 Wash.2d 615, 999 P.2d 602 (2000); *State ex rel. Evergreen Freedom Found. v. Wash. Educ. Ass'n,* 111 Wash.App. 586, 49 P.3d 894 (2002).

[12] *See* RCW 42.17.390; RCW 42.17.400(5).

[13] The Public Disclosure Act, Chapter 42.17 RCW, has a five-year statute of limitations. RCW 42.17.410.

whether WEA had "used" agency fees for political expenditures.[14]

At trial, several accountants offered differing opinions on whether WEA had used agency fees to make political expenditures. The parties' jointly retained expert, Michael Gocke, testified that if there were sufficient member dues to pay for all non-chargeable expenses, then agency fees could not have been used to pay for any non-chargeable or political expenditures. Laird S. Vanetta, WEA's expert, opined that WEA had not used agency fees for political expenditures because there were sufficient additional revenues (other than dues or fees) to pay for all of WEA's political expenditures. The State's expert, Jerry Lee Baliban, opined that WEA had used agency fees for political expenditures because **[631]**once WEA commingled fees with other funds in its general account, every expenditure from that account became tainted with a proportionate share of agency fees.

In July 2001, the superior court issued a letter opinion finding that WEA had violated RCW 42.17.760. The court wrote: "WEA violates RCW 42.17.760 when it collects agency fees and then spends them for prohibited purposes in ratio to the total agency fees and dues collected *without affirmative authorization.*"[15] In its findings of fact, the court explained that "WEA used agency fees, from each [nonmember] who did not receive any refund of part of their fees, for [political]

---

[14] Clerk's Papers (CP) at 350.

[15] CP at 361 (footnote omitted).

expenditures."[16] The court adopted the "proportionality" theory that the State's expert presented, finding that "when agency fees were commingled with other funds in the general treasury, expenditure of any general treasury monies to influence an election or support a political committee results in use of a proportionate share of agency fees for such purposes."[17] In sum, the trial court found that WEA violated RCW 42.17.760 when it (1) failed to refund the non-chargeable portion of agency fees to non-objectors; (2) commingled the un-refunded fees with other revenue in its general fund; and (3) later made political expenditures from the general fund.

The superior court assessed a $200,000 penalty against WEA and then doubled the **[248]**penalty under RCW 42.17.400(5), finding that WEA had intentionally violated RCW 42.17.760.[18] The court based its finding of intent on evidence that WEA knew what the statute required but violated it anyway.[19] For example, WEA had previously

---

[16] CP at 371.

[17] CP at 373.

[18] Each violation of the Fair Campaign Practices Act, Chapter 42.17 RCW, is punishable by a penalty up to $10,000. RCW 42.17.390(3).

[19] The court found that "WEA was aware of RCW 42.17.760 and that [it] foreclosed the use of agency fees for [political expenditures] without the affirmative authorization of the fee payer." CP at 372.

[632]acknowledged that the statute "makes all [non-member]s into objectors."[20]

Finally, the superior court entered a permanent injunction and awarded costs and fees to the State. The injunction ordered WEA to implement certain measures and prohibited it from collecting agency fees that are equivalent to member dues.

I. RCW 42.17.760

WEA argues that the superior court's interpretation of RCW 42.17.760 is unconstitutional because it impinges on political speech without any sufficiently compelling government interest. We presume that a statute is constitutional, and the party challenging it must prove that it is unconstitutional beyond a reasonable doubt.[21]

A. AGENCY FEES AND THE FIRST AMENDMENT

The only authority that a union has to compel nonmembers to pay agency fees is statutory. Statutes that compel nonmembers to pay fees to a union are known as agency shop laws. Nonmembers have challenged these laws numerous times as an infringement on their First Amendment rights. RCW 41.59.060(2) and 41.59.100 compel Washington public educational employees to contribute money to WEA.

---

[20] CP at 208 (WEA's April 1998 reply memorandum supporting motion to dismiss claim brought by EFF); *accord* CP at 86 (April 2000 WEA memorandum in support of summary judgment).

[21] *Belas v. Kiga*, 135 Wash.2d 913, 920, 959 P.2d 1037 (1998).

The Constitution requires that unions finance their political and ideological expenditures (non-representational activities) with revenues from employees who do not object to advancing those ideas.[22] Thus, nonmembers who object to the union's non-representational activities (objectors) **[633]**have a constitutional right to pay only the chargeable portion of the agency fee, i.e., the fair share fee. In other words, by objecting to the union's non-representational activities, a nonmember asserts his or her First Amendment rights and cannot be compelled to pay more than his or her fair share of the union's chargeable expenditures.

In a 1961 decision, *International Ass'n of Machinists v. Street,*[23] the U.S. Supreme Court addressed whether a union "receiving an employee's money should be free, despite that employee's objection, to spend his money for political causes which he opposes."[24] The Court held that a union could not spend an objecting employee's money in such a manner. Balancing union members' constitutional rights against objectors' rights, the Court stated:

> [T]he majority [union members] also has an interest stating its views without being silenced by the dissenters [objectors]. To attain the *appropriate reconciliation between majority and dissenting interests* in the area of

---

[22] *See Ellis,* 466 U.S. at 448-55, 104 S.Ct. 1883; *Abood,* 431 U.S. at 235-36, 97 S.Ct. 1782; *Bhd. of Ry. & S.S. Clerks, Freight Handlers, Express & Station Employees v. Allen,* 373 U.S. 113, 121-22, 83 S.Ct. 1158, 10 L.Ed.2d 235 (1963); *Int'l Ass'n of Machinists v. Street,* 367 U.S. 740, 770, 81 S.Ct. 1784, 6 L.Ed.2d 1141 (1961) (a union must not support its political activities with an objecting employee's mandatory fees.)

[23] *Street,* 367 U.S. 750, 81 S.Ct. 1784.

[24] *Street,* 367 U.S. at 749, 81S.Ct. 1784.

> political expression, we think the courts ... should select remedies which protect both interests to the maximum extent possible *without undue impingement of one on the other.*[25]

[249]Dealing with whether employees had any obligation to voice an objection, the Court stated:

> [D]issent is not to be presumed--it must affirmatively be made known to the union by the dissenting employee. The union receiving money exacted from an employee under a union-shop agreement should not in fairness be subjected to sanctions in favor of an employee who makes no complaint of the use of his money for such activities.[26]

Thus, the Court enunciated that the First Amendment free speech right was preserved by its exercise. Employees who do not want a union to use their money for political **[634]**expenditures must make their objection known to the union.

In *Abood,*[27] the Court had to determine whether the states could constitutionally permit "the use of [nonmember]s' fees for purposes other than collective bargaining."[28] The Court held that unions could use non-objectors' fees for such

---

[25] *Street*, 367 U.S. at 773, 81 S.Ct. 1784 (emphasis added).

[26] *Street*, 367 U.S. at 774, 81 S.Ct. 1784.

[27] *Abood*, 431 U.S. 209, 97 S.Ct. 1782.

[28] *Abood*, 431 U.S. at 232, 97 S.Ct. 1782.

purposes.[29] Justice Powell, in a concurring opinion joined by Justice Burger (the Chief Justice) and Justice Blackmun, noted that nonmembers must object to prevent the union from using their fees for political expenditures:

> The Court today holds that compelling an employee to finance a union's "ideological activities unrelated to collective bargaining" violates the First Amendment regardless of any asserted governmental justification. But the Court also decides that compelling an employee to finance any union activity that may be "related" in some way to collective bargaining is permissible under the First Amendment because such compulsion is "relevant or appropriate" to asserted governmental interests. *And the Court places the burden of litigation on the individual. In order to vindicate his First Amendment rights in a union shop, the individual employee apparently must declare his opposition to the union* and initiate a proceeding to determine what part of the union's budget has been allocated to activities that are both "ideological" and "unrelated to collective bargaining."[30]

Thus, in 1977, the Court again reiterated both the balance and the remedy, i.e., expression of objection, in a union or agency shop situation.

---

[29] *See Abood*, 431 U.S. at 235-36, 97 S.Ct. 1782 ("[T]he Constitution requires only that [a union's political] expenditures be financed from charges, dues, or assessments paid by employees who do not object to advancing those ideas and who are not coerced into doing so against their will by the threat of loss of governmental employment.").

[30] *Abood*, 431 U.S. at 254, 97 S.Ct. 1782 (Powell, J., concurring) (citations omitted; emphasis added).

In 1986, the Court again dealt with the situation under examination in *Chicago Teachers Union, Local No. 1, AFT, AFL-CIO v.* **[635]***Hudson.*[31] there, the court cited *ABOOD* and twice stAted [sic] that nonmembers must object to prevent a union from using their fees for political expenditures.

In *Abood,* we reiterated that *the nonunion employee has the burden of raising an objection,* but that the union retains the burden of proof.

> ....
>
> ... *The nonunion employee,* whose First Amendment rights are affected by the agency shop itself and who *bears the burden of objecting,* is entitled to have his objections addressed in an expeditious, fair, and objective manner.
>
> ....
>
> ... We reiterate that ... *the nonunion employee has the burden of objection.*[32]

In sum, nonmembers who do not want the union to use their fees for non-chargeable expenditures must make their objection **[250]** known to the union.[33] After a nonmember

---

[31] *Chicago Teachers Union, Local No. 1, AFT, AFL-CIO v. Hudson,* 475 U.S. 292, 106 S.Ct. 1066, 89 L.Ed.2d 232 (1986).

[32] *Hudson,* 475 U.S. at 306, 307, 309, 106 S.Ct. 1066 (emphasis added).

[33] *See Street,* 367 U.S. at 774, 81 S.Ct. 1784 ("Any remedies, however, would properly be granted only to employees who have *made known* to the union officials *that they do not desire* their funds to be used for political causes to which they object.... [O]nly those who have identified themselves as opposed to political uses of their funds are entitled to

(continued...)

objects, the union must prove that its fair share fee was correctly calculated and does not include non-chargeable expenditures.[34]

[636]B. CONSTITUTIONALLY REQUIRED AGENCY FEE COLLECTION PROCEDURES

Because the payment of fees affects nonmembers' First Amendment rights, the procedures used to collect fees must "be carefully tailored to minimize the infringement" on those rights.[35] Therefore, unions cannot exact fees from nonmembers "without first establishing a procedure which will avoid the risk that their funds will be used, even temporarily, to finance ideological activities unrelated to

---

[33] (...continued)
relief.") (emphasis added); *Allen*, 373 U.S. at 119, 83 S.Ct. 1158 ("No respondent who does not in the course of the further proceedings in this case *prove that he objects* to such use [of agency fees by the union for nonrepresentational activities] will be entitled to relief.") (emphasis added); *Abood*, 431 U.S. at 235-36, 97 S.Ct. 1782 ("[T]he Constitution requires only that [nonrepresentational activities] be financed from charges, dues, or assessments paid by *employees who do not object* to advancing those ideas and who are not coerced into doing so against their will by threat of loss of governmental employment.") (emphasis added); *Hudson*, 475 U.S. at 302, 106 S.Ct. 1066 (The objective under the First Amendment " 'must be to devise a way of preventing compulsory subsidization of ideological activity by employees *who object thereto* without restricting the Union's ability to require every employee to contribute to the cost of collective-bargaining activities.' " (quoting *Abood*, 431 U.S. at 237, 97 S.Ct. 1782) (emphasis added))).

[34] *Hudson*, 475 U.S. at 306, 106 S.Ct. 1066.

[35] *Hudson*, 475 U.S. at 303, 106 S.Ct. 1066.

collective bargaining."[36] We address this collection procedure only to demonstrate its thoughtful construction by the Supreme Court in connection with the balancing and the remedy that they selected to resolve controversies.

In *Hudson,*[37] the Supreme Court laid out three requirements for the collection of agency fees: unions must (1) provide an "adequate explanation of the basis for the fee" (the *Hudson* notice); (2) give the objector "a reasonably prompt opportunity to challenge the amount of the fee before an impartial decisionmaker"; and (3) have "an escrow for the amounts reasonably in dispute while such challenges are pending."[38] The *Hudson* notice ensures that non-members have sufficient information to decide whether to challenge the union's calculation of the fair share fee.[39]

WEA appears to follow *Hudson's* requirements. Agency fees remain in escrow until either: (1) the nonmember does not object to the union's collection of the funds, in which case the funds are released to the union; (2) the nonmember objects and accepts the union's fair share fee calculation, in which case he or she receives a refund in that amount; or (3) the nonmember objects and challenges the union's calculation, **[637]**in which case an impartial decision maker decides the

---

[36] *Abood,* 431 U.S. at 244, 97 S.Ct. 1782 (Stevens, J., concurring).

[37] *Hudson,* 475 U.S. 292, 106 S.Ct. 1066.

[38] *Hudson,* 475 U.S. at 310, 106 S.Ct. 1066.

[39] *See Hudson,* 475 U.S. at 306, 106 S.Ct. 1066 ("Basic considerations of fairness, as well as concern for the First Amendment rights at stake ... dictate that the potential objectors be given sufficient information to gauge the propriety of the union's fee.").

proper fee and the nonmember receives a refund in that amount.

C. RCW 42.17.760 CREATES AN "OPT IN" SITUATION.

RCW 42.17.760 relieves nonmembers of their burden of objection. Its affirmative authorization requirement creates a presumption that all nonmembers object to the use of their fees for political expenditures. Thus, RCW 42.17.760 is an "opt-in" procedure – nonmembers must give their authorization before the union may use their fees on political expenditures. The statute does not follow the Court's carefully crafted and balanced approach.

Although WEA's fee collection system might satisfy the procedures laid down in [251]*Hudson*, that alone does not satisfy the affirmative authorization requirement in RCW 42.17.760. Indeed, nonmembers who fail to object do not affirmatively authorize the union to use their fees for political expenditures.[40]

D. THE NINTH AND SIXTH CIRCUITS HAVE REJECTED OPT-IN REMEDIES

---

[40] *See* BLACK'S LAW DICTIONARY 59-60 (7th ed.1999) (defining "affirmative" as: "1. That supports the existence of certain facts < affirmative evidence>. 2. That involves or requires effort <an affirmative duty>.").

Two federal circuit courts have rejected opt-in remedies as unduly burdensome on unions. In *Mitchell*,[41] the Ninth Circuit reversed a district court that had imposed an opt-in requirement on a union's agency fee collection system. There, nonmembers argued that the union could collect fees that were equivalent to member dues only if they affirmatively consented to contribute to the union's non-chargeable expenditures.[42] Although the nonmembers had failed to object, the district court enjoined the union from collecting any more than the fair share fee from nonmembers " 'unless **[638]**the [nonmember] affirmatively consents to deduction of full union dues.' "[43]

The Ninth Circuit rejected the nonmembers' argument and reversed the district court. It relied on a "long line" of Supreme Court cases holding that nonmembers' rights are "adequately protected" when they are given the opportunity to object to paying fees that are equivalent to member dues. [44] The court noted that in *Lehnert v. Ferris Faculty Ass'n*,[45] the Supreme Court's most recent decision in the area of agency

---

[41] *Mitchell v. Los Angeles Unified Sch. Dist.*, 963 F.2d 258 (9th Cir.), *cert. denied*, 506 U.S. 940, 113 S.Ct. 375, 121 L.Ed.2d 287 (1992).

[42] *Mitchell*, 963 F2d at 259.

[43] *Mitchell*, 963 F.2d at 259 (quoting *Mitchell v. Los Angeles Unified Sch. Dist.*, 744 F.Supp. 938, 945 (C.D.Cal.1990)).

[44] *Mitchell*, 963 F.2d at 260, 261, 260-62 (citing *Lehnert v. Ferris Faculty Ass'n*, 500 U.S. 507, 519, 111 S.Ct. 1950, 114 L.Ed.2d 572 (1991); *Ellis*, 466 U.S. 435, 104 S.Ct. 1883; *Abood*, 431 U.S. 209, 97 S.Ct. 1782; *Allen*, 373 U.S. 113, 83 S.Ct. 1158; *Street*, 367 U.S. 740, 81 S.Ct. 1784).

[45] *Lehnert*, 500 U.S. 507, 111 S.Ct. 1950.

fees, the premise remained that employees had the burden of objecting. The Ninth Circuit then proceeded to expressly identify the remedy that they had previously acknowledged:

> There is, accordingly, no support for the [nonmember]s' position in this case that affirmative consent to deduction of full fees is required in order to protect their First Amendment rights. The Supreme Court has repeatedly held that nonunion members' rights are adequately protected when they are given the opportunity to object to such deductions and to pay a fair share fee to support the union's representation costs. Indeed, this court has expressly articulated the [nonmember]s' burden in *Grunwald v. San Bernardino City Unified Sch. Dist.*, 917 F.2d 1223 (9th Cir.1990). In determining the adequacy of nonunion employees' notice to the union of their objection to the full fee, we said: "The Supreme Court has clearly held that the nonunion employee has the burden of raising an objection. 'The nonmember's "burden" is simply the obligation to make his objection known.' " *Id.* at 1229 (citation omitted) (quoting *Hudson*, 475 U.S. at 306 n. 16, 106 S.Ct. at 1075 n. 16).[46]

The Ninth Circuit then addressed the nonmembers' argument that their right not to pay for non-chargeable **[639]**expenditures was analogous to a criminal defendant's constitutional rights and thus required their intentional relinquishment of the right. The court rejected the analogy:

> The case before us ... reveals none of the coercive elements so palpable in a police confrontation. The Supreme Court has never suggested that employees who are offered the opportunity to object to the union fee

---

[46] *Mitchell*, 963 F.2d at 261.

> deduction and do not do so act under any compulsion. There is thus no basis, either factual or legal, for the district court's conclusion that plaintiffs were **[252]**"compelled" to acquiesce, in violation of their First Amendment rights.[47]

Instead, the court found a closer analogy in the "opt-out" procedure for class action lawsuits. An "opt-in" procedure, the court found, "would *unduly impede* the union in order to protect the 'relatively rare species' of employee who is unwilling to respond to the union's notifications but nevertheless has serious disagreements with the union's support of its political and ideological causes."[48]

In *Weaver*,[49] the Sixth Circuit held that nonmembers' silence after sufficient opportunity to object from paying for non-chargeable expenses could indicate acquiescence. The court relied on the line of cases requiring employees to object to the use of their funds for non-chargeable expenditures and the Ninth Circuit's decision in *Mitchell*.[50]

> [T]he [nonmember]s' argument [that silence cannot be construed as waiver of the right to object from paying for non-chargeable expenditures] must fall because it seeks

---

[47] *Mitchell*, 963 F.2d at 262.

[48] *Mitchell*, 963 F.2d at 263 (emphasis added).

[49] *Weaver v. Univ. of Cincinnati*, 970 F.2d 1523 (6th Cir.1992), *cert. denied*, 507 U.S. 917, 113 S.Ct. 1274, 122 L.Ed.2d 668 (1993).

[50] *Weaver*, 970 F.2d at 1532 (citing *Hudson*, 475 U.S. 292, 106 S.Ct. 1066; *Abood*, 431 U.S. 209, 97 S.Ct. 1782; *Allen*, 373 U.S. 113, 83 S.Ct. 1158; *Street*, 367 U.S. 740, 81 S.Ct. 1784; *Ry. Employees' Dep't v. Hanson*, 351 U.S. 225, 76 S.Ct. 714, 100 L.Ed. 1112 (1956).

> to *shift the balance of interests* underlying all of the Supreme Court's pronouncements on the subject of agency shop fees. An "opt-in" procedure would *greatly burden* unions while offering only a **[640]**modicum of control to nonunion employees whose procedural rights have already been safeguarded by *Hudson.*[51]

RCW 42.17.760's affirmative authorization requirement, like the opt-in procedure imposed by the district court in *Mitchell,* would unduly require a union to protect nonmembers who disagree with a union's political expenditures but are unwilling to voice their objections. The procedures imposed on unions by federal law fully protect nonmembers' First Amendment rights. Further restrictions, such as an opt-in procedure, upset the balance between nonmembers' rights and the rights of the union and the majority.[52]

Furthermore, in *Allen,*[53] the Court acknowledged a union's right to spend nonobjectors' fees on political expenditures: "no decree would be proper which appeared likely to infringe on the *unions' right* to expend uniform exactions under the union-shop agreement in support of activities germane to collective bargaining and, as well, to expend nondissenters'

---

[51] *Weaver,* 970 F.2d at 1533 (emphasis added).

[52] *See Abood,* 431 U.S. at 238, 97 S.Ct. 1782 ("[T]hose union members who do wish part of their dues to be used for political purposes have a right to associate to that end 'without being silenced by the dissenters.' " (quoting *Street,* 367 U.S. at 772-73, 81 S.Ct. 1784)); *see also supra* note 33.

[53] *Allen,* 373 U.S. 113, 83 S.Ct. 1158.

such exactions in support of political activities." [54] The affirmative authorization requirement in RCW 42.17.760 also ignores a union's right to use non-objectors' agency fees on political expenditures.

RCW 42.17.760's affirmative authorization requirement unduly burdens unions. RCW 42.17.760 is unconstitutional in light of the U.S. Supreme Court caselaw and the reasoning articulated by the Ninth Circuit. Because all other decisions of the trial court hinged on the constitutionality of RCW 42.17.760, we do not address them. We reverse **[641]**the trial court's judgment, including the injunction,[55] attorney fees, and penalties.

II. Attorney Fees

WEA requests its attorney fees and costs at trial and on appeal.[56] WEA has now **[253]**prevailed. Accordingly, we remand to the trial court with directions to determine (1) whether WEA should receive the costs and attorney fees that it reasonably incurred at the trial level; (2) the amount of the same, if any; and (3) the amount of costs and attorney fees that WEA has reasonably incurred on this appeal.

---

[54] *Allen*, 373 U.S. at 122, 83 S.Ct. 1158 (emphasis added).

[55] The trial court's injunction ignores that RCW 41.59.060(2) grants a union the right to collect fees equivalent to member dues.

[56] *See* RCW 42.17.400(5) ("If the defendant prevails, he shall be awarded all costs of trial, and may be awarded a reasonable attorney's fee to be fixed by the court to be paid by the state of Washington."); RAP 18.1 (attorney fees are allowed on appeal only if authorized by applicable law); *Ur-Rahman v. Changchun Dev., Ltd.*, 84 Wash.App. 569, 576, 928 P.2d 1149 (1997) (statute authorizing fees to the prevailing party at trial authorizes fees on appeal).

Reversed.

I concur: MORGAN, P.J.

HUNT, C.J.

I respectfully concur in part and dissent in part. I agree with the majority that under RCW 42.17.760, the union may *collect* agency fees, including those it ultimately intends to use for political purposes. But I disagree with the majority's conclusion that the sta-tute is unconstitutional in prohibiting the political *use* of fees col-lected from nonmembers without their prior affirmative authorization.

I also concur in the majority's reversal of penalties assessed against the WEA. On the record before us, it appears that the WEA was operating under a good faith belief that its actions were lawful so long as it refunded agency fees to nonmembers upon request and used for political purposes only those nonmember fees for which employees had not expressly requested rebates.

[642]I. CONSTITUTIONALITY OF STATUTE

RCW 42.17.760, entitled, "Agency shop fees as contributions," provides:

> A labor organization may not *use* agency shop fees paid by an individual who is not a member of the organization to make contributions or expenditures to influence an election or to operate a political committee, *unless affirmatively authorized* by the individual.

(Emphasis added.) The cases the majority cites do not hold that the Constitution bars a statutory provision, such as RCW

42.17.760, which requires a nonmember employee's affirmative authorization before a union can use his or her agency fee for political purposes.

For example, at pages 248 and 249 of their opinion, the majority cites two Railway Labor Act cases, *International Ass'n of Machinists v. Street,* 367 U.S. 740, 81 S.Ct. 1784, 6 L.Ed.2d 1141 (1961), and *Brotherhood of Railway and Steamship Clerks v. Allen,* 373 U.S. 113, 83 S.Ct. 1158, 10 L.Ed.2d 235 (1963), for the proposition that an "opt in" provision is not constitutionally required; with this proposition I agree. But these cases do not support the converse, advanced by the majority here, that an "opt in" provision such as Washington's is constitutionally barred.

Similarly, in a First Amendment case also cited by the majority, *Abood v. Detroit Board of Education,* 431 U.S. 209, 97 S.Ct. 1782, 52 L.Ed.2d 261 (1977), the Supreme Court held that a public teachers' union may not use a nonmember's agency fees to underwrite the union's political activity over the nonmember's objection. In so holding, the Court sought to craft a fee-collection procedure that would prevent compulsory subsidization of ideological activity by employees who object thereto [1] without restricting the Union's ability to require every employee to contribute to the cost of collective-bargaining activities **[643]**and [2] without allowing "union members who do wish part of their dues to be used for political purposes ... [to be] silenced by the dissenters." *Abood,* 431 U.S. at 237-38, 97 S.Ct. 1782 (citation omitted). In crafting this remedy, the Court sought "guidance" from *Street* and *Allen,* reciting that "dissent is not to be presumed." *Abood,* 431 U.S. at 237-38, 97 S.Ct. 1782. Nonetheless, *Abood* does not expand this clause to hold that that an "opt in"

procedure is constitutionally impermissible, as the majority here infers.[57]

[254]*Ellis v. Brotherhood of Railway, Airline & Steamship Clerks,* 466 U.S. 435, 104 S.Ct. 1883, 80 L.Ed.2d 428 (1984), supports this limited reading of *Abood* as stopping short of finding a constitutional requirement that the burden of dissent rests on the objecting employee. The Court noted that *Street, Allen,* and *Abood* "did not, nor did they purport to, pass upon the statutory or constitutional adequacy of the suggested remedies."[58] *Ellis,* 466 U.S. at 443, 104 S.Ct. 1883.

Similarly, in *Chicago Teachers Union, Local No. 1 v. Hudson,* 475 U.S. 292, 106 S.Ct. 1066, 89 L.Ed.2d 232 (1986), the Court addressed whether a specific union procedure adequately protected a dissenting employee's right to "prevent the Union[ ] [from] spending a part of [his] required service fees to contribute to political [activity] ... unrelated to its duties as exclusive bargaining representative." *Hudson,* 475 U.S. at 302, 106 S.Ct. 1066 (citations and quotations omitted). The Court repeatedly stated that under that specified union procedure, the employee bore the burden of objecting.

---

[57] Moreover, Justice Stevens left the door open for alternative remedies. *Abood,* 431 U.S. at 244, 97 S.Ct. 1782 (Stevens, J. concurring). Only Justice Powell, as the majority here notes at page 249, reads the majority opinion in *Abood* as placing the burden of dissent on the objecting employee. *Abood,* 431 U.S. at 254-55, 97 S.Ct. 1782 (Powell, J. concurring). In contrast, the majority in *Abood* does not go so far as to hold that the Constitution *requires* the burden of dissent to be placed on the objecting employee.

[58] Although in *Abood,* the Court did mention placement of the burden of dissent in the context of its discussion on remedies, *Abood,* 431 U.S. at 237-38, 97 S.Ct. 1782, in *Ellis,* it neither mentioned nor addressed the burden of dissent.

Hudson, 475 U.S. at 306-07, 309, 106 S.Ct. 1066. Again, however, the Court **[644]**did not hold that the Constitution *mandates* that such burden rest on the employee.[59]

In *Mitchell v. Los Angeles Unified School District,* 963 F.2d 258 (9th Cir.1992), the Ninth Circuit Court of Appeals addressed the constitutional sufficiency of a school district union's "opt out" procedure for nonmember employees. The employees argued that an "opt in" procedure was constitutionally required, to which the Court responded that "the Constitution does not *mandate* a system under which nonmembers pay full union dues only if they 'opt in.'" *Mitchell,* 963 F.2d at 260 (emphasis added). The Ninth Circuit read the Supreme Court opinions mentioned above as holding "that nonunion members' rights are adequately protected when they are given the opportunity to object to such deductions and to pay a fair share fee to support the union's representation costs." *Mitchell,* 963 F.2d at 261. Similar to these Supreme Court opinions, however, in *approving* an "opt out" procedure, the *Mitchell* Court did not hold that the Constitution *requires* an "opt out" procedure in lieu of an "opt in" procedure like the one at issue here.

In short, the cases that the majority cites simply uphold "opt out" procedures as constitutional. None, however, hold that the Constitution *requires* an "opt out" procedure or that the burden of dissent must be on the objecting employee. Further, none of these cases hold that a statutory "opt in" procedure, such as the one in RCW 42.17.760, is constitutionally infirm,

---

[59] Nor did the *Hudson* Court question the constitutionality of placing such a burden on the dissenting employee.

contrary to the majority's finding here that an "opt out" procedure is constitutionally mandated.

II. STATUTORY LIMITATIONS

Washington's statutory scheme allows unions to collect fees and dues from union members and equivalent agency fees from non-union members. RCW 41.59.100; RCW 41.59.060(2). **[645]**Although employees have the right to refrain from joining a union, they may nonetheless be required to pay "a fee to any employee organization under an agency shop agreement." 41.59.060(1). But the union cannot spend such non-members' fees for political purposes without such employees' affirmative authorization. RCW 42.17.760. Rather, non-authorizing nonmembers are entitled to rebates of that portion of their agency fees that would have gone for union political expenses. RCW 42.17.760.

Here, the parties' jointly retained expert, Michael Gocke, testified that member dues alone were sufficient to cover all WEA political expenses. But the practical effect of such a scheme would be to shift a disproportionate share of the collective bargaining expenses onto nonmembers' agency fees: In essence, the non-members would pay a portion of the members' share of the collective bargaining expenses, thus freeing up a larger share of the members' dues for political expenses. **[255]**Such a scheme appears to contra-dict the Legislature's goals of (1) equal allocation of collective bargaining expenses between members and non-members, (2) equal allocation of political expenses between members and affirmatively assenting non-members, and (3) retention of the political expense portion of agency fees to non-assenting

non-members. *See* RCW 41.59.060(1); RCW 41.59.100; RCW 42.17.760.

Even taking the evidence here in the light most favorable by the WEA, the record supports the trial court's findings that

> WEA violates RCW 42.17.760 when it collects agency fees and then spends them for prohibited purposes in ratio to the total agency fees and dues collected *without affirmative auth-orization.*

Clerk's Papers (CP) at 361.

> WEA used agency fees, from each [nonmember] who did not receive any refund of part of their fees, for [political] expenditures.

CP at 371.

[646]Accordingly, I would affirm the trial court's conclusion of law that

> [w]hen agency fees were commingled with other funds in the general treasury, expenditure of any general treasury monies to influence an election or support a political committee results in use of a proportionate share of agency fees for such purposes.

CP at 373. I would also uphold the trial court's injunction prohibiting the WEA from collecting agency fees, equivalent to member dues, from nonmembers who do not first affirmatively authorize a portion for political expenditures as the Legislature has prescribed in RCW 42.17.760.

III. PENALTIES

I would affirm the trial court's finding that the WEA contravened the plain, and constitutional, language of RCW 42.17.760 when (1) it knowingly collected nonmember fees,

in part for political expenditures, without those nonmembers' prior affirmative authorization; and (2) refunded such fees only when a nonmember specifically requested a rebate. Therefore, I dissent from the majority's contrary holding on this point.

But I concur in the majority's reversal of the penalties assessed against the WEA. The record shows that the WEA had a good faith basis for relying on its interpretation of the statute and for requiring nonmembers to request rebates following collection of agency fees. Clearly, the WEA read and interpreted the Supreme Court cases in a manner consistent with my learned colleagues' reading as rendering the "opt in" collection method unconstitutional. In spite of my dissention from the majority's legal conclusion as to the constitutionality of the statute, I do not find the penalties against WEA warranted and, therefore, I concur in the majority's reversal of the penalties assessed below.

APPENDIX E

ORDER OF THE SUPERIOR COURT FOR THE STATE OF WASHINGTON

10 May 2001

[file stamp omitted in printing]
IN THE SUPERIOR COURT
OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF THURSTON

STATE OF WASHINGTON, ex. rel. WASHINGTON STATE PUBLIC DISCLOSURE COMMISSION, Plaintiff, vs. WASHINGTON EDUCATION ASSOCIATION, Defendant.	NO. 00-2-01837-9 ORDER REGARDING CROSS-MOTIONS FOR SUMMARY JUDGMENT Hearing Date: 5/4/01

THIS MATTER having come on for the Court's consideration based upon the Defendant's Motion for Summary Judgment and Plaintiff's Motion for Partial Summary Judgment, and the Court having considered records and files herein, the arguments of the parties in open court, and being otherwise fully advised; and the Court having considered the following:

1) Defendant's Motion for Summary Judgment;
2) Defendant's Memorandum in Support of Summary Judgment;
3) Declaration of Thomas Hedges;
4) Declaration of James S. Seibert and exhibits thereto;

5) Plaintiff's Memorandum in Response to Defendant's Motion for Summary Judgment and attachments thereto;
6) Declaration of D. Thomas Wendel for Defendant's Summary Judgment, and exhibits thereto;
7) Defendant's Reply Memorandum in Support of Summary Judgment;
8) Declaration of Harriet Strasberg (4/30/2001) and exhibits thereto;
9) Second Declaration of James S. Seibert;
10) Plaintiff's Motion for Partial Summary Judgment
11) Memorandum Supporting Plaintiff's Motion for Partial Summary Judgment;
12) Declaration of D. Thomas Wendel for Partial Summary Judgment and exhibits thereto;
13) Defendant's Response to Plaintiff's Motion For Summary Judgment;
14) Declaration of Harriet Strasberg (4/23/2001) and exhibits thereto;
15) Declaration of James D. Oswald and exhibits thereto;
16) Plaintiff's Reply Memorandum for Partial Summary Judgment;
17) Declaration of D. Thomas Wendel for Summary Judgment Reply and exhibit thereto; and
18) Supplemental Declaration of D. Thomas Wendel for Summary Judgment Reply and exhibits thereto.

THE COURT HEREBY CONCLUDES AS FOLLOWS:

1. RCW 42.17.760 is constitutional.
2. RCW 42.17.760 does not unconstitutionally amend RCW 41.59.100.
3. RCW 42.17.760 requires affirmative authorization from agency fee payers, albeit not necessarily written by the fee

payer, before Defendant may collect or use fees to influence an election or to support a political committee, and defendant's "Hudson" procedures do not satisfy this requirement.

4. Defendant has collected, without the required affirmative authorization, agency fees to be used to influence an election or to support a political committee.
5. There is an issue of fact whether Defendant in this case has, in fact, used agency fees to influence an election or to support a political committee.

ACCORDINGLY, IT IS HEREBY ORDERED THAT: Defendant's Motion for Summary Judgment is DENIED; Plaintiff's Motion for Partial Summary Judgment is GRANTED, in part; and the issues set forth in paragraph 5 above shall be determined in the trial scheduled to be begin on May 14, 2001.

DONE IN OPEN COURT this 10th day of May, 2001.

/s/ Gary R. Taber
Judge Gary R. Taber

Presented by:

Telephonic Approval
D. Thomas Wendel, WSBA #15445
Attorney for Plaintiff

Approved as to form,
Notice of Presentation Waived:

/s/ Judith A. Lonnquist
Judith A. Lonnquist, WSBA #06421
Attorney for Defendant

APPENDIX F

CONSTITUTIONAL AND STATUTORY PROVISIONS

CONSTITUTIONAL AND STATUTORY PROVISIONS

UNITED STATES CONSTITUTION
First Amendment

The **First Amendment** provides in pertinent part:

> Congress shall make no law . . . abridging the freedom of speech, . . . or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

The **Fourteenth Amendment** provides in pertinent part:

> **Section 1.** . . . . No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

WASHINGTON FAIR CAMPAIGN PRACTICES ACT

The **Washington Fair Campaign Practices Act, § 760**; RCW 42.17.760 provides:

> A labor organization may not use agency shop fees paid by an individual who is not a member of the organization to make contributions or expenditures to influence an election or to operate a political committee, unless affirmatively authorized by the individual.